

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

Randall Lee DALTON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 17-04057-CV-C-NKL
)	
Michael BARRETT, et al.,)	
)	
Defendants.)	

JOINT MOTION FOR ENTRY OF CONSENT JUDGMENT

Come now Plaintiffs and Defendants and jointly move this Court for entry of consent judgment. A copy of the proposed consent judgment is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ Anthony E. Rothert
Anthony E. Rothert, #44827
American Civil Liberties Union
of Missouri Foundation
906 Olive Street, Suite 1130
St. Louis, Missouri 63108
Phone: (314) 652-3114
trothert@aclu-mo.org

Attorney for Plaintiffs

/s/ J. Gregory Mermelstein
J. Gregory Mermelstein, #33836
Deputy Director/General Counsel
1000 West Nifong, Building 7, Suite 100
Columbia, Missouri 65203
Telephone: (573) 777-9977
Fax: (573) 777-9975
greg.mermelstein@mspd.mo.gov

Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon counsel for each party by operation of this Court's ECF/CM system on May 13, 2019.

/s/ Anthony E. Rothert

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

Randall Lee DALTON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 17-04057-CV-C-NKL
)	
Michael BARRETT, et al.,)	
)	
Defendants.)	

[PROPOSED] CONSENT JUDGMENT

I. BACKGROUND

- a.** On March 9, 2017, Plaintiffs filed this class action petition for injunctive and declaratory relief in the Circuit Court of Cole County, State of Missouri, on behalf of themselves and all those similarly situated across the state, against the Missouri State Public Defender (MSPD), then-Governor Eric Greitens, and the State of Missouri (Defendants). Specifically, Plaintiffs, all indigent defendants with pending criminal cases at the time of filing, alleged multiple and longstanding systemic deficiencies in the delivery of indigent defense services by the Defendants, placing them, and all indigent defendants across the state, at a substantial risk of receiving constitutionally-defective representation at critical stages of their prosecution, in violation of their Sixth Amendment right to effective counsel and Article 1, Section 18(a) of the Missouri Constitution.
- b.** On April 7, 2017, Defendants State of Missouri and then-Governor Eric Greitens removed the case to the U.S. District Court, Western District of Missouri, with the consent of the MSPD.

- c. On July 24, 2017, this Court denied the motion to dismiss filed by Defendants State of Missouri and Governor Greitens, and allowed Plaintiffs to move forward with their claims of actual and constructive denial of counsel on a system-wide basis. Defendants State of Missouri and Governor Greitens subsequently appealed the district court's decision on the motion to dismiss, arguing sovereign and legislative immunity.
- d. On January 10, 2019, the Eighth Circuit Court of Appeals reversed the trial court's motion to dismiss order and dismissed Defendants State of Missouri and Governor Greitens from the case, leaving MSPD Director Barrett and MSPD Commissioners Bock, Jackson, Chval, and Hogan as the remaining defendants.
- e. On February 26, 2019, this Court denied Plaintiffs' motion for class certification and, soon thereafter, ordered the parties to enter mediation in advance of trial.
- f. Following court-ordered mediation, Plaintiffs and the MSPD have agreed on the following terms in this Consent Judgment in order to resolve this case short of trial and to ensure that MSPD's prospective representation of indigent clients is both effective and in compliance with all relevant professional and ethical standards at every critical stage of each client's case. The Parties agree that such effective representation shall include: timely and frequent client communication; meaningful representation of indigent defendants at initial appearances, bail and bail reduction hearings, and preliminary hearings; timely review of discovery; sufficient case investigation in order to determine the relative strengths and weaknesses of the state's case; retention of qualified experts whenever necessary to provide effective representation; robust pre-trial motion practice; timely and

thorough preparation for trial; timely and thorough preparation for sentencing; and competent direct appeal advocacy.

II. Findings of Fact

- a.** The Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1441(a), and venue is proper under 28 U.S.C. § 1391(b)(1).
- b.** Plaintiffs are criminal defendants adjudged to be indigent under the standards set by Missouri law. *See* Mo. Rev. Stat. §§ 600.017(10), 600.086, 600.090; 18 C.S.R. § 10-3.010.
- c.** Defendants are the Director and Commissioners of the Missouri State Public Defender System, which provides direct representation to indigent defendants in Missouri pursuant to Chapter 600.
- d.** Plaintiffs and Defendants (the Parties) have determined that this Agreement is the most effective and prudent means to resolve the disputed issues underlying this action, rather than to engage in trial and appeal, which have the potential to be both long and costly, particularly in light of the extensive and uncontroverted record in this case regarding MSPD's excessive attorney caseloads and woefully inadequate resources, as well as the urgency surrounding the need to reach a resolution for the thousands of indigent defendants who continue to be harmed by the status quo.
- e.** Indeed, since its establishment, MSPD has been evaluated at least 10 times by various outside groups.¹ All ten evaluations have reached a similar conclusion:

¹ These include assessments conducted in 1993 (The Spangenberg Group); 2005 (The Spangenberg Group); 2006 (Interim Committee of the Missouri Senate); 2009 (The Spangenberg Group); 2010 (U.S. Department of Justice – Bureau of Justice Assistance); 2010 (American Bar Association); 2013 (National Juvenile Defender Center); 2014 (ABA-RubinBrown); 2016 (U.S. Department of Justice); and 2016 (Sixth Amendment Center).

that MSPD's excessive caseload calls into serious doubt whether clients receive constitutionally required and effective representation.

- f. And, in the time since the last of these reports, the situation has only worsened. From Fiscal Year 2015 to Fiscal Year 2017, MSPD's caseload increased more than 16%.
- g. Uncontroverted evidence presented in this case shows that, in Missouri, indigent defendants often appear in court without counsel during critical early stages of their case, including at initial appearance, where bail is typically set.
- h. Uncontroverted evidence presented in this case shows that, in Missouri, indigent defendants are routinely deprived of the basic functions of legal representation, including: regular communication; investigation of potentially available defenses; timely pre-trial discovery; legal research and motions practice; preparation for plea negotiations and counseling; key preliminary hearings; and trial.
- i. Indeed, in Fiscal Year 2018, a deposition was taken in no more than 3% of MSPD cases; investigations were conducted in no more than 22% of MSPD's cases; and, in cases that could have gone to a jury trial,² less than one percent of (.75%) MSPD's clients received a jury trial.
- j. Uncontroverted evidence presented in this case shows that, as a result of the deficiencies in their legal representation, indigent defendants in Missouri routinely face prejudice in their cases, including: unknowing or inadvertent waiver of defenses; waiver of meaningful due process requirements such as preliminary hearings or bond hearings; loss of exculpatory evidence over time;

² A number of cases handled by MSPD's trial division are not eligible for a jury trial, to include mental health release petition cases, juvenile cases, and probation revocation cases.

repeated continuances that subject defendants to prolonged detention or court supervision; and insufficient adversarial testing of the strength of the prosecution's evidence.

- k.** For example, Plaintiff Viola Bowman is an indigent defendant charged with first-degree murder and armed criminal action. On January 6, 2015, she appeared without counsel at her first arraignment, where her bail was set at \$1,000,000, which is what it remains. She was later assigned an MSPD attorney, who has requested continuances on more than 30 occasions, including multiple continuances of Bowman's trial. Trial is now set for August 2019, some four-and-a-half years after she first entered custody. In total, Bowman has been in pre-trial detention for more than 1,500 days. In his most recent continuance motion, her attorney stated that, in addition to his managerial responsibilities as District Defender of a district serving three counties, he was personally providing representation on 228 open and 61 inactive files, including Bowman's first-degree murder charge.
- l.** These deficiencies also appear with respect to MSPD's representation of juvenile respondents in criminal and juvenile proceedings. As recently as 2013, the National Juvenile Defender Center (NJDC) deployed dozens of experts in Missouri to study its juvenile court system and assess the extent and quality of representation being provided to children in the State. The NJDC Report concluded that, after "endur[ing] at least two decades of crushing caseloads and inadequate resources to provide its mandated services," Missouri's juvenile indigent defense system is "broken" and is improperly "forced to ration services."

Moreover, uncontroverted evidence presented in this case indicates that, like their adult counterparts, juveniles accused of crimes in Missouri often go unrepresented at critical stages of their cases. The NJDC report concluded that nearly 60 percent of court-involved children in Missouri go without a public defender entirely. Indeed, MSPD's Director of Juvenile Defense and Policy testified that she did not disagree with any of NJDC's findings.

- m. Because MSPD views itself as being constrained on the one hand by its workloads and bound on the other hand by ethical requirements proscribed by the Rules of Professional Conduct, MSPD has placed thousands of indigent defendants on waitlists over the last year and a half. As of this writing, some 4,316 indigent defendants are on waitlists in Missouri, many of whom remain in pre-trial detention. During their time on a waitlist, indigent defendants have no access to legal representation whatsoever.
- n. While MSPD does not admit that the constitutional rights of any specific indigent defendant or defendants, including Plaintiffs, have been violated, the Parties agree that the evidence in this case shows that MSPD attorneys devote, on average, just 21% of the time that prevailing professional norms suggest is adequate for the kind of offense for which they were undertaking representation.³

III. Conclusions of Law

³ At the request of the ABA, RubinBrown researchers reviewed MSPD data and calculated the average number of hours (excluding court time, travel, and related administrative tasks) that an attorney would need to devote to a range of different types of cases in order to provide constitutionally adequate representation. The study determined that a constitutionally adequate attorney would spend an average of 106.6 hours on non-capital murder/homicide; 47.6 hours on A/B felonies; 25.0 hours on C/D felonies; 63.8 hours on sex felonies; 11.7 hours on misdemeanors; 9.8 hours on probation violations; and 19.5 hours on each juvenile case.

- a. The right to counsel in criminal cases is protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 18 of the Missouri Constitution. *See, e.g., Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008); *United States v. Wade*, 388 U.S. 218, 228 (1967); *State ex rel. Mo. Pub. Def. Comm’n v. Pratte*, 298 S.W.3d 870, 874-75 & n.4 (Mo. banc 2009).
- b. The federal and state constitutions require the State to provide counsel to criminal defendants who are unable to afford their own legal representation. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Pratte*, 298 S.W.3d at 874-75 & n.4; *see also Geders v. United States*, 425 U.S. 80, 88–91 (1976) (holding that a criminal defendant has a constitutional right to consult with his appointed counsel).
- c. The federal Constitution also requires that States provide meaningful representation to indigent juveniles facing delinquency proceedings. *In re Gault*, 387 U.S. 1, 36 (1967).
- d. Counsel must provide at least minimally adequate representation in order to meet federal constitutional standards. *See United States v. Cronin*, 466 U.S. 648, 653 (1984); *see also Strickland v. Washington*, 466 U.S. 668 (1984).
- e. The right to counsel may be conceived of as both prospective—i.e. applying from the outset of the criminal proceeding—and retroactive, i.e. permitting a guilty verdict or plea to be set aside if an individual defendant proves that the absence of competent counsel affected her criminal proceeding. *See Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008); *see also State ex rel. Missouri Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592, 597 (Mo. banc. 2012).

- f. Proof that systemic inadequacies in a State’s public defense system have routinely resulted in actual or constructive denials of counsel at critical stages of prosecution will support a claim for prospective relief under the Sixth Amendment. *See Cronin*, 466 U.S. at 653; *Tucker v. State*, 394 P.3d 54, 62 (Idaho 2017); *Waters*, 370 S.W.3d at 608; *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718 (Pa. 2016).
- g. The routine absence of “traditional markers of legal representation” from a state public defense system—namely, counsel’s frequent nonattendance during critical stages of the criminal proceedings; minimally adequate communication with clients; and/or failure to conduct sufficient investigation⁴—will demonstrate that a State’s public defense system is constitutionally inadequate. *See Geders v. United States*, 425 U.S. 80, 88–91 (1976); *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1137 (W.D. Wash. 2013); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Pub. Defender v. State*, 115 So. 3d 261 (Fla. 2013); *State v. Citizen*, 898 So. 2d 325 (La. 2005); *State v. Peart*, 621 So. 2d 780 (La. 1993).
- h. When systemically deficient counsel routinely results in the multiplication of the collateral consequences that attend the pendency of a criminal case; prolongs the loss of liberty in the form of pre-trial detention; and substantially impairs indigent defendants’ ability to compete on an equal footing within the criminal-justice system, there is actual prejudice. *See* ECF No. 69 at 36–37 (citing *Barker v.*

⁴ The U.S. Department of Justice has identified and articulated the “traditional markers of legal representation” in various amicus briefs and statements of interest filed in other public defense reform cases across the country. *See, e.g., Hurrell-Harring, et al. v. State of New York, et al.*, Index No. 8866-07, Doc. No. 11697717 at 12-14 (N.Y. Sup. Ct. 2014), Statement of Interest of the United States; *Kuren, et al. v. Luzerne County, et al.*, 2015 WL 10768531 at 11-13 (Pa. 2016), Brief of the United States as *Amicus Curiae* in Support of Appellants; *Tucker, et al. v. State of Idaho, et al.*, No. 43922-2016, Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants at 25-28.

Wingo, 407 U.S. 514, 532–33 (1972); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

- i. The constitutional guarantee of the assistance of counsel is a guarantee of “untrammeled and unimpaired” loyalty; representation by an attorney “struggl[ing] to serve two masters” amounts to a denial of counsel for purposes of the Sixth Amendment. *Glasser v. United States*, 315 U.S. 60, 70, 75 (1942). In other words, an attorney forced to choose between the interests of two clients—co-defendants with conflicting defenses, for instance, or a current and a former client—is hopelessly compromised as far as the Constitution is concerned. A defendant need not show prejudice if his attorney is laboring under a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). Where an attorney is unable to provide constitutionally adequate representation to all her clients, her clients’ interests are in opposition with one another: doing the constitutional minimum for one defendant necessarily takes time that could be spent providing the constitutional minimum to another. *See Public Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 267 (Fla. 2013); *People v. Roberts*, 321 P.3d 581, 589 (Colo. App. 2013); *State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W. 3d 592, 609 (Mo. banc 2012); *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746-47 (Cal. Ct. App. 2009); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1275 (N.D. IL 1996).
- j. Although MSPD denies that its attorneys aim to provide anything other than constitutionally-adequate representation, the Parties agree that, given the overwhelming admissible evidence that MSPD is grossly overburdened, and that

the burden under which it operates routinely and systematically harms indigent criminal defendants by depriving them of competent counsel, there is a high likelihood that Plaintiffs would be able to prove their constitutional claims against the MSPD.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND ORDERED as follows:

IV. PARTIES

- a. Plaintiffs Viola Bowman, Brian Richman, Dorian Samuels, and Randall Lee Dalton (“Plaintiffs”).
- b. Defendants Michael Barrett, in his official capacity as Director of the Missouri State Public Defender Office, and Riley Bock, Charles R. Jackson, Craig Chval, and A. Crista Hogan, all in their official capacities as members of the Missouri State Public Defender Commission (collectively, “MSPD Defendants” or “MSPD”).

V. DEFINITIONS

- a. **Action** refers to this lawsuit, *Dalton, et al. v. Barrett, et al.*, filed by Plaintiffs on March 9, 2017, and originally captioned *Shondel Church, et al. v. State of Missouri, et al.*
- b. **Arraignment** refers to the proceeding at which a criminal defendant or juvenile respondent in Missouri is presented with the formal charges against them and is required to enter a plea.
- c. **Assigned caseload** means the number of new cases an individual public defender has been assigned by their attorney-manager over a specified time period.
- d. **Attorney-managers** are MSPD attorneys, including District Defenders, who are responsible for the supervision and evaluation of attorneys within a particular office, unit or division.
- e. **Caseload data** refers to information related to the assignment, management, and disposition of cases by MSPD attorneys, including but not limited to the number

of cases handled, the nature of those cases, and the amount of time spent on each case.

- f. **Caseload standard** refers to the MSPD's annual case assignment limit, as established under this Consent Judgment, which requires MSPD to ensure that, over the course of any given calendar month period, public defenders not be assigned more than 173.3 hours' worth of cases, based on the numbers established by the American Bar Association and the accounting firm RubinBrown as part of the 2014 Missouri Project, as articulated in Section XVIII(c) of this Consent Judgment.
- g. **Criminal justice stakeholders** include indigent defendants, public defenders, judges, prosecutors, probation officers, legislators, or other actors within, or with authority over, Missouri's criminal legal system.
- h. **Day** means a business day unless otherwise specifically noted.
- i. **Delphi methodology** is the process of congregating expert opinion through a series of iterative questionnaires, with a goal of coming to a group consensus. Several rounds of questionnaires are sent out to the group of experts, and the anonymous responses are aggregated and shared with the group after each round. The Delphi method was employed by the authors of the 2014 Missouri Project, which identified the average amount of time attorneys should spend on particular types of criminal cases in order to provide their clients with reasonably effective legal representation.
- j. **District Defender** is the supervising attorney in one of MSPD's district offices across the state.
- k. **Effective date** is the date on which this Consent Judgment is approved and signed by the Court.
- l. **Excessive workloads** are workloads that prevent public defenders from providing constitutionally-effective representation to each of their clients due primarily to the unreasonably high number of cases to which the attorneys are assigned.
- m. **Initial appearance** refers to the first proceeding at which a criminal defendant or juvenile respondent in Missouri appears before a court, and during which the court sets bail for defendants or respondents held in custody.
- n. **Monitor** refers to the person or entity selected by the Parties to ensure that the MSPD implements each of the provisions articulated in this Consent Judgment in a satisfactory and timely manner.
- o. **Parties** refers collectively to Plaintiffs Viola Bowman, Brian Richman, Dorian Samuels, and Randall Lee Dalton, and Defendants Michael Barrett, in his official

capacity as Director of the Missouri State Public Defender Office, and Riley Bock, Charles R. Jackson, Craig Chval, and A. Crista Hogan, all in their official capacities as members of the Missouri State Public Defender Commission.

- p. **Pending (open) caseload** means all cases to which a public defender is currently assigned which have not reached final disposition, such as dismissal, guilty plea, trial, or, in cases of direct appeal, issuance of the appellate mandate.
- q. **Preliminary hearing** is the proceeding at which the State must establish probable cause to believe that the defendant committed the crime(s) charged and that, therefore, the case should be allowed to move forward.
- r. **Public defenders** are MSPD attorneys who are responsible for representing indigent defendants in Missouri.
- s. **Substantial compliance** means that the MSPD has met, or is likely to meet, all or most of the requirements articulated in Sections VI through XVI, and XVIII through XIX(a) of this Consent Judgment, for a period of at least two consecutive years. The determination as to whether the MSPD has achieved substantial compliance shall be made by the Monitor. Either Party may appeal the Monitor's decision with respect to substantial compliance to this Court.

VI. INITIAL APPEARANCES

- a. The MSPD shall ensure that all criminal defendants and juvenile respondents have immediate access to applications for public defender services by, among other things, ensuring that county jails are aware of and in compliance with all relevant laws and rules regarding the provision of such applications.
- b. The MSPD shall ensure that all criminal defendants and juvenile respondents are promptly screened for indigence in order to provide representation at such person's initial appearance.
- c. The MSPD shall strive to ensure that such prompt screening occurs within two days from receipt of a defendant's application for public defender services, unless further financial investigation is needed, in which case the prospective client shall be notified of the financial investigation within the same time period.

- d. The MSPD shall ensure that public defenders make all reasonable efforts to meet with the client, in a private and confidential space, prior to the initial appearance, and that in-court discussions with clients supplement, not supplant, such meetings.
- e. The MSPD shall ensure that public defenders make an argument for the client's release at the initial appearance and/or for a bail amount that the client can afford to pay.
- f. The MSPD shall ensure that public defenders advise all clients not to waive any substantive rights or plead guilty at the initial appearance.

VII. BAIL ADVOCACY

- a. The MSPD shall ensure that all public defenders receive training and are familiar with all relevant laws and rules concerning bail, including the legal factors that the court may and may not consider in setting bail amounts and what conditions of release may be imposed.
- b. In the event that the court declines to release the client pre-trial and/or the client is unable to post bail, MSPD shall ensure that public defenders promptly file a motion for a bail review hearing.
- c. The MSPD shall ensure that public defenders spend sufficient time meeting with clients prior to any bail hearing in order to ascertain sufficient information to advocate for the defendant's pre-trial release under conditions that are the least restrictive to the client. This should include gathering information regarding any potential evidence or witnesses that should be present at any such bail hearing to

demonstrate that the client is not a flight risk or a threat to public safety, in accordance with Missouri Supreme Court Rule 33.01.

- d. In the event that the court declines to reduce his or her bail to an amount that the client can afford, the MSPD shall ensure that all public defenders: inform clients of their right to review under Missouri Supreme Court Rules 33.05, 33.06, 33.09, and any other applicable Rules on bail review; advise clients on the considerations of seeking such review; and provide representation in such review.
- e. In the event that the client remains in pre-trial detention, MSPD shall ensure that the appointed public defender alerts the incarcerating authority and/or the court, concerning any special needs of the client, including but not limited to, any dietary restrictions, health-related matters, and religious or faith-based needs.
- f. The MSPD shall ensure that clients who are unable to make bail within 30 days of their first appearance are prioritized with motions for a speedy trial, unless there is good cause to refrain from so filing, in which case such cause should be documented in the client's file.

VIII. CLIENT COMMUNICATION

- a. In addition to any other communication requirements, the MSPD shall ensure that trial-level public defenders meet with each client within the first seven days following the assignment of the case, as well as every 30 days thereafter, unless there are no significant updates in the client's case.
- b. The MSPD shall ensure that public defenders answer all client correspondence (including electronic correspondence such as email or text) within 10 days of receipt and all phone messages from clients within two days of receipt.

- c. For any incarcerated clients, client meetings should occur in a private and confidential location at the jail. If there is no such space available, other locations such as an office or private room at the courthouse are acceptable alternatives, provided they are confidential and not part of a docket on which the client is appearing.
- d. The MSPD shall ensure that client meetings occur at least one day before scheduled court dates and may be supplemented, but not supplanted, by follow-up meetings on the day of the proceeding in question.
- e. The MSPD shall take appropriate legal steps to ensure that county jails and state prisons are in compliance with all laws and rules regarding access to counsel and the privacy of client communications.

IX. PRELIMINARY HEARINGS

- a. The MSPD shall ensure that public defenders promptly seek a preliminary hearing in each client's case, unless there are compelling, client-specific reasons to waive that right in that individual client's case.
- b. The MSPD shall ensure that, in advance of and in preparation for any preliminary hearing, the public defender meets with the client: to obtain all relevant information; to seek any available discovery from the prosecution; to conduct a preliminary investigation of the facts underlying the criminal charges, and to secure any helpful witnesses to counter testimony given by the prosecution's witnesses.

- c. The MSPD shall ensure that public defenders seek and obtain the written transcript of any preliminary hearing proceedings when necessary to prepare for trial, and that the transcript is shared with the client.
- d. The MSPD shall ensure that, during the course of the preliminary hearing, the public defender is prepared to examine and cross-examine relevant witnesses, and, whenever possible, to formulate an argument that the evidence presented by the prosecution fails to demonstrate the existence of probable cause as to at least one element of the crime charged.

X. DISCOVERY

- a. The MSPD shall ensure that all public defenders receive training and are familiar with the nature and scope of all laws and rules concerning discovery in criminal cases, including all information that is obtainable under law.
- b. The MSPD shall ensure that, in every case, public defenders file written requests for discovery pursuant to Missouri Supreme Court Rule 25.03(b) within two days of the filing of the information or indictment, and no later than 20 days following arraignment.
- c. In addition, the MSPD shall ensure that public defenders file a written request for discovery pursuant to Missouri Supreme Court Rule 25.03(a) in all felony cases within two days of the initial appearance.
- d. The MSPD shall ensure that, whenever appropriate, public defenders petition the court to order further discovery that is not covered by Missouri Supreme Court Rule 25.03, pursuant to Missouri Supreme Court Rule 25.04.

- e. In the event that discovery is not timely provided, the MSPD shall ensure that public defenders file a motion to compel discovery and seek whatever relief is appropriate for failure to provide timely discovery.
- f. The MSPD shall provide training to all public defenders on the proper pre-trial investigation of witnesses, including when it is necessary or appropriate to conduct interviews and/or depositions of adverse witnesses, including law enforcement officers.
- g. The MSPD shall ensure that the results of any pre-trial investigation, including any evidence gleaned from depositions, is obtained with sufficient time to communicate such results to the client, and so that such information may be adequately used at trial.

XI. INVESTIGATION/EXPERT WITNESSES

- a. The MSPD shall ensure that, in every case, public defenders promptly review all discovery information obtained in connection with the case and conduct whatever investigation is appropriate to allow for the fullest possible understanding of the facts, allegations, circumstances, and merits of the case, as well as the range of punishment that may be imposed in the event of a conviction.
- b. The MSPD shall ensure that public defenders request the assistance of an investigator if the same is necessary to secure all such relevant information.
- c. The MSPD shall ensure that, in every case, public defenders review all discovery information obtained in connection with the case within 30 days of receipt.

- d. The MSPD shall provide training to all public defenders on the proper use of experts in their cases, including when it is necessary or appropriate to retain an expert witness.
- e. If the public defender determines that an expert would be necessary or helpful to the client's case, the public defender shall promptly request the resources necessary to identify and retain the appropriate expert(s).
- f. The MSPD shall provide training to all public defenders on the proper use of mental health exams and shall ensure that public defenders seek mental health exams for clients when appropriate.
- g. The MSPD shall ensure that funds are distributed in a timely manner in order to secure the services of any expert(s) or mental health exam(s). In the event that no funds are available, the MSPD shall ensure that public defenders file appropriate motions seeking such funding pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

XII. PRE-TRIAL MOTION PRACTICE

- a. The MSPD shall ensure that public defenders receive sufficient training on pre-trial motion practice, including on local court rules governing the procedure and time limitations for filing and litigating pre-trial motions.
- b. The MSPD shall ensure that, only after conducting sufficient investigation and researching relevant law, public defenders file any motions they deem strategically and legally appropriate in each client's case, including but not limited to motions that address:
 - i. Bail reduction;
 - ii. Speedy trial;

- iii. Unreasonable searches and seizures;
 - iv. Illegally obtained statements from the defendant;
 - v. Suggestive identification procedures;
 - vi. Severance from or joinder with other defendant(s) or charges;
 - vii. Funds for experts, investigations, special procedures, etc.;
 - viii. Change of venue or judge;
 - ix. Unconstitutionality of the statute under which the client is charged;
 - x. Insufficiency of the charging document under which the client is charged; and
 - xi. Insufficiency of the evidence in a felony case, as presented to either the grand jury or circuit court, resulting in the filing of the indictment or information.
- c. The MSPD shall ensure that public defenders consider, and discuss with the client, any potential benefits the client may receive, as well as any potential adverse effects that the client might suffer, as a result of any pre-trial motions.
 - d. The MSPD shall ensure that public defenders also consider filing motions *in limine* to bring the trial court's attention to any problematic issues which might arise at trial.
 - e. The MSPD shall ensure that public defenders strive to review motion drafts with clients prior to filing, incorporate client feedback when helpful to the litigation and, if not helpful, explain to the client the reasons for excluding such feedback from the motion.
 - f. The MSPD shall ensure that public defenders mail or provide copies of all motions filed to the client within five days of filing the motion.

XIII. GUILTY PLEAS

- a. The MSPD shall ensure that, before advising any client to plead guilty, public defenders request and review all discovery concerning the case, as well as any information acquired as part of a preliminary investigation, and conduct any further investigation, including the consulting and hiring of experts, if needed to determine potential defenses to the charge(s).
- b. The MSPD shall ensure that, before advising any client to plead guilty, public defenders share that information with the client and discuss the prospective strengths and weaknesses of the prosecution's case, including the availability of likely prosecution witnesses, the concessions and benefits that are subject to negotiation, and the possible consequences of a conviction.
- c. The MSPD shall ensure that public defenders do not advise a client to plead guilty merely because of the pre-trial incarceration of a client. In such cases, MSPD shall ensure that public defenders seek an immediate bail reduction hearing.
- d. The MSPD shall ensure that before a public defender advises any client to plead guilty, the complete circumstances of the case warrant such advice.
- e. The MSPD shall ensure that public defenders discuss with any client who is, or whom the public defender believes may be, a non-citizen, any potential immigration consequences to a guilty plea or conviction after trial. The MSPD shall ensure that all public defenders are familiar with the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), and the obligations of defense counsel in advising non-citizen clients, as articulated by the U.S. Supreme Court.

- f. The MSPD shall ensure that, notwithstanding the existence of ongoing plea negotiations, public defenders continue to prepare the case as if it was proceeding to trial.
- g. The MSPD shall ensure that prior to advising a client to accept any plea offer, the public defender must be satisfied that:
 - i. There is a substantial likelihood of conviction at trial, based on a thorough investigation, and that it is consistent with the client's goals and in the client's best interests to plead guilty under the circumstances;
 - ii. Any guilty plea is entered into voluntarily and intelligently, based on a thorough review of the facts and investigation, and that the client understands all aspects of the plea agreement, as well as all consequences of a guilty plea under the agreement;
 - iii. The client understands the rights that he/she is waiving, including: the right to a trial by jury; the right to assistance of counsel at trial; the right to compulsory process; the right to confront witnesses; the right to testify; the privilege against self-incrimination; and the state's burden of proof beyond a reasonable doubt; and
 - iv. The client understands the consequences of conviction, including: the maximum possible sentence faced; any mandatory minimum sentence; the potential liability for enhanced punishment; collateral consequences, such as having to register as a sex offender and potential exposure to civil commitment under the sexually violent predator law; probation and parole requirements; and potential civil liabilities arising out of conviction for the particular offense(s) in question.

XIV. TRIAL

- a. The MSPD shall ensure that public defenders invest the appropriate time and resources preparing for each client's trial. Such preparation shall include, at a minimum:
 - i. Using the facts and information developed through prior investigation of the case and/or initiating further investigation necessary to bolster the client's defense;

- ii. Subpoenaing witnesses favorable to the defense;
 - iii. Discussing with the client the right to remain silent and the right to testify, and, if he or she indicates a willingness to testify, preparing the client to testify;
 - iv. Developing case themes;
 - v. Obtaining coverage for the public defender's other appearances while trial is ongoing;
 - vi. Developing *voir dire* questions that are consistent with the public defender's theme or theory of the case; and
 - vii. Developing opening statements, direct and cross-examinations, closing arguments, and jury instructions that advance case themes.
- b. Any trial conducted by a public defender with fewer than five years of experience with MSPD shall be second-chaired by a more experienced MSPD attorney.

XV. SENTENCING

- a. The MSPD shall ensure that public defenders adequately prepare for each client's sentencing hearing. Such preparation shall include, at a minimum, a thorough understanding and consideration of:
- i. The range of punishment for each offense for which the client stands convicted, and the possibility of concurrent or consecutive sentencing;
 - ii. The collateral consequences of any possible sentence;
 - iii. The client's preferable sentencing outcome given the available options;
 - iv. The official version of the client's prior arrest and conviction history, if any;
 - v. Any letters or other correspondence from individuals or entities in support of a favorable sentence for the client;
 - vi. Any need for a pre-sentence mental examination and/or commitment to a mental hospital as an aid to sentencing;
 - vii. The typical sentencing practices of the sentencing judge;

- viii.** The position of the probation department with respect to the client, together with any reports or recommendations to be submitted by that office, including the pre-sentence investigation report;
 - ix.** The sentencing recommendation of the prosecutor;
 - x.** The likely conditions of a possible probation, particularly as they relate to restitution or other fines and fees;
 - xi.** Any alternative sentences that are available to the court; and
 - xii.** Any other information, evidence, or proposal that may be helpful to the client.
- b.** The MSPD shall ensure that, to the extent possible, public defenders take steps to advocate for a favorable sentencing recommendation for each client, including by calling relevant witnesses at the sentencing hearing in order to obtain a more favorable sentence.
- c.** The MSPD shall ensure that public defenders consult with the client before any sentencing assessment report (SAR) is finalized and submitted to the court; and
- d.** The MSPD shall ensure that, with regard to the SAR, public defenders carefully review the report with the client, challenge incorrect information or omissions, correct such mistakes, and consider submitting an independent sentencing memorandum on behalf of the client.

XVI. DIRECT APPEAL

- a. The MSPD shall ensure that appellate public defenders notify their client within seven days of being assigned to such client's case.
- b. In addition to the other communication requirements, the MSPD shall ensure that appellate public defenders keep the client timely informed of all developments in

their case, such as: record on appeal due dates; extension requests; brief due dates; oral argument dates; and post-opinion motions.

- c. The MSPD shall ensure that appellate public defenders mail copies of all records on appeal, extension requests, briefs, appellate opinions, and post-opinion motions, to clients within two days of filing.
- d. The MSPD shall ensure that appellate public defenders answer all client correspondence (including in electronic form such as email or text) within 10 days of receipt and all phone messages from clients within two days of receipt.
- e. Prior to filing an opening brief on appeal, the MSPD shall ensure that appellate public defenders have at least one in-person meeting with the client during which the public defender shall discuss potential issues to be raised on appeal. Although the public defender shall make the ultimate choice of issues to raise on appeal, the public defender shall consider and take into account the input of the client as to choice of issues, and shall seek to reach mutual agreement with the client as to issues to be raised.
- f. The MSPD shall ensure that appellate public defenders file a reply brief in a case whenever the merits of a case so require. There shall be a presumption that the merits of a case require a reply brief, unless the public defender can articulate a valid legal reason(s) to the contrary.
- g. The MSPD shall ensure that appellate public defenders seek oral argument in a case whenever the merits of the case so require. There shall be a presumption that the merits of a case require oral argument, unless the public defender can articulate a valid legal reason(s) to the contrary.

- h.** The MSPD shall ensure that appellate public defenders notify clients of the appellate opinion in their case within two days of its filing by the appellate court. The appellate public defender shall also notify clients within the same two days whether the public defender will be filing post-opinion motions, such as motions for rehearing or transfer.
- i.** Post-opinion motions shall be filed whenever the merits of a case so require. If the public defender informs a client that they will be filing post-opinion motions, the MSPD shall ensure that the appellate public defender timely files such motions.
- j.** The MSPD shall ensure that appellate public defenders notify their clients within two days of the filing of the appellate opinion that the public defender will not be filing post-opinion motions, so that the clients may have time to pursue such motions on their own.
- k.** The MSPD shall ensure that appellate public defenders notify clients of the denial of an intermediate appellate court's post-opinion motion within two days of the denial, and also notify clients within the same two days whether the appellate public defender will be filing an application for transfer with the Missouri Supreme Court.
- l.** The MSPD shall ensure that appellate public defenders timely file an application for transfer whenever the merits of a case so require, and where the public defender has informed the client that they would file for transfer.
- m.** The MSPD shall ensure that appellate public defenders notify their clients within two days of a denial of a post-opinion motion by an intermediate appellate court

that the public defender will not be filing an application for transfer so that clients may have time to pursue such an application on their own.

- n. The MSPD shall ensure that appellate public defenders file a petition for writ of certiorari with the United States Supreme Court whenever the merits of a case dictate that it would be appropriate to do so.

XVII. MONITOR

- a. In order to facilitate the successful implementation of this Consent Judgment, the Court shall appoint a Monitor to assess, on an ongoing basis, the extent to which the MSPD complies with the terms of this Consent Judgment, and to advise the Court on any compliance issues that may arise. The Monitor's authority shall be limited to the duties expressly set forth in this Consent Judgment.
- b. Within seven days of the Effective Date of this Consent Judgment, the Parties shall identify and recommend potential monitors, on which the Parties mutually agree, to the Court for consideration. The Court shall make the final determination as to which of these proposed monitors will be appointed as Monitor for purposes of this Consent Judgment. Should the Monitor, or any successor, become unwilling or unable to serve as Monitor while this Consent Judgment is effective, then the Parties shall mutually agree upon two to four potential successors and recommend those individuals to the Court, which shall appoint a successor from among those recommended by the Parties. MSPD shall make all reasonable efforts to ensure that the fees and costs of the Monitor are paid in full, and in a timely manner.

XVIII. CASELOAD CAPACITY

- a. The MSPD shall ensure that public defenders practice within the ethical guidelines set forth in the Rules of Professional Conduct, including taking affirmative steps to avoid concurrent conflicts of interest under Missouri Supreme Court Rule 4-1.7. *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W. 3d 592, 607-608 (Mo. banc 2012).⁵
- b. The MSPD shall ensure that, in order to fulfill the requirements contained herein, public defenders are not assigned or do not accept more clients and cases than they can effectively and ethically represent.
- c. In order to establish thresholds for representation, MSPD became the first public defender system in the nation to subject itself to a rigorous audit. Toward this end, the American Bar Association (ABA) enlisted the services of the accounting firm RubinBrown, which used the Delphi methodology to estimate the average time required, as it relates to controllable case tasks,⁶ for an attorney to provide reasonably effective representation for each case type. *See attached The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards*, Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, 2014 (hereafter "RubinBrown workload averages").⁷

⁵ "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Rule 4-1.7(a)(2). "[A] conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."

⁶ Uncontrollable case tasks include such things as time spent appearing in court, necessary case travel, as well as various public defender training and administrative requirements. Such tasks are often dictated by the court's schedule and the area covered by the public defender area office.

⁷ The Missouri Project has prompted several other states to engage in the same type of rigorous review, also using the Delphi methodology. Several of these states have since factored in additional "Controllable Case Tasks" (e.g., attorney training and administrative time), which has increased the amount of hours-per-case for each case type. Also, The Missouri Project does not account for attorney experience. Because Missouri's numbers do not include several of these factors, the hours-per-case in the chart above actually undercount the number of actual hours required for each case type.

- d. The RubinBrown workload averages are as follows:

Case Type	Controllable Case Task Hours per Case
Murder / Homicide	106.6
A/B Felony	47.6
C/D Felony	25.0
Sex Felony	63.8
Misdemeanor	11.7
Juvenile	19.5
Appellate / PCR	96.5
Probation Violation	9.8

- e. Unless otherwise provided herein, the MSPD shall ensure that public defenders not exceed the MSPD caseload standard, as defined in Section V above.
- f. The first component of the caseload standard is the number of available work hours in a given year, which, under this Consent Judgment, shall equal 40 hours a week, 52 weeks a year, with no time allotted for vacation or sick time, no time allotted for training or administrative functions, and no holidays. This equates to 2,080 hours of available work time over the course of a year.
- g. The second component of the caseload standard entails calculating the number of cases an attorney is assigned over a given period, i.e., “assigned caseload,” using the RubinBrown workload averages described above as the benchmark.
- h. The MSPD caseload standard will limit case assignments to no more than 2,080 hours’ worth of case work each year. This means that, for each calendar month period, MSPD shall ensure that public defenders not be assigned more than 173.3 hours’ worth of case work.
- i. Unless otherwise provided herein, and notwithstanding any provision of law to the contrary, no public defender shall be assigned a number of cases in excess of the MSPD caseload standard, according to the RubinBrown workload averages.

- j. The MSPD shall ensure that attorney-managers maintain an accurate record to ensure that each public defender's assigned caseload does not exceed the MSPD caseload standard.
- k. Unless otherwise provided herein, if accepting an additional case would mean requiring any public defender's assigned caseload to exceed the MSPD caseload standard, the MSPD office in question shall not accept any additional cases, and shall not process any further indigence applications, until an appropriately experienced public defender with a caseload that falls under the cap becomes available. To do otherwise may constitute a violation of the Missouri Rules of Professional Conduct and would violate this Consent Judgment. The MSPD Director shall take whatever steps are legally authorized in order to prevent any public defender from exceeding the caseload cap articulated herein.
- l. In lieu of processing additional indigence applications when this standard has been reached and placing such defendants on a wait list for public defender services, the MSPD shall ensure that the relevant District Defender promptly notifies the circuit court that the caseload standard has been reached in order to promptly allow the court to: (1) appoint private counsel pursuant to *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (1981) and *Williamson v. Vardeman*, 674 F.2d 1211 (1982); (2) engage with the prosecutor regarding the elimination of incarceration as a possible sentence for the offense(s) charged, thus eliminating the constitutional right to an attorney pursuant to *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); (3) dismiss the case per the requirements set forth in *Ruddy* and *Williamson*; or (4) take any other actions that are consistent with the constitutions

of the United States and Missouri, and that do not violate the requirements and limitations of this Consent Judgment.

- m. For case types that do not have a number of hours assigned by RubinBrown, the Parties shall agree on an hourly number that is consistent with other RubinBrown workload averages. For example, because Class E felonies were added by the legislature after the creation of the RubinBrown standards, within 30 days of the Effective Date of this Consent Judgment, the Parties shall agree on a proposed standard for Class E felonies that is consistent with other RubinBrown workload averages. Thereafter, the Parties shall reach such agreement within 30 days of identifying a case type that was not included in the RubinBrown study.⁸
- n. Because capital cases are also not included among the RubinBrown case types, the MSPD shall ensure that public defenders comply with the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition 2003)(published in 31 *Hofstra L. Rev.* 913 (2003)), and the American Bar Association's *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008)(published in 36 *Hofstra L. Rev.* 677 (2008)).
- o. The MSPD may, from time to time, permit a public defender to deviate below the MSPD caseload standard if, in MSPD's discretion, such deviation is necessary to provide effective representation to a public defender's existing clients or to otherwise comply with the Rules of Professional Conduct. Reasons for downward deviation may include, but are not limited to, the complexity of the

⁸ Other potential case types not referenced in the RubinBrown study may include, but are not limited to, writs of prohibition and mandamus, declaratory judgment actions, and writs of habeas corpus.

assigned cases; court and case scheduling; the availability of support staff; a public defender's tenure, experience, and ability; a public defender's non-representational duties; health, vacancy, and leave situations; as well as the relative unpredictability of non-controllable case tasks such as in-court advocacy, travel, training, and administrative time.

- p.** The MSPD may, from time to time, permit a public defender to deviate above the MSPD caseload standard if, in MSPD's judgment, such deviation would not jeopardize that attorney's ability to effectively represent his or her existing clients or otherwise violate his or her professional obligations under the Rules of Professional Conduct. Reasons for upward deviation may include, but are not limited to, the complexity of the assigned cases; court and case scheduling; the availability of support staff; and a public defender's tenure, experience, and ability. For example, an appellate public defender who has completed all currently assigned legal briefs may receive an additional case assignment. Any regular or routine deviation(s), along with the justification for such deviation, should be included in any subsequent report to the Monitor.
- q.** Because MSPD attorney-managers have additional supervisory responsibilities under the Rules of Professional Conduct,⁹ including oversight of anywhere from two to 34 subordinate attorneys, depending on the district, such attorney-managers should have a caseload that is in proportion to their management responsibilities, as determined by MSPD, but in no event shall such caseload

⁹ Missouri Supreme Court Rule 4-5.1.

exceed an assigned caseload of more than 130 hours' (.75 of 173.3) worth of case work in a given calendar month period.

- r. Unless otherwise provided by law, when one or more public defenders in a district office become available to accept a new case or cases based on the requirements set forth herein, the MSPD shall ensure that defendants who are detained pre-trial are prioritized for representation.
- s. A public defender may be required to move to withdraw from one or more cases in order to comply with the requirements set forth herein and in order to ensure effective assistance of counsel and compliance with ethical obligations under the Rules of Professional Conduct. If withdrawal is appropriate, the MSPD shall ensure that public defenders identify the appropriate case or cases that will have the least impact on the client or clients.

XIX. REPORTING

- a. On or before January 1, April 1, July 1, and October 1 of each year, the MSPD shall provide the Monitor and Plaintiffs' counsel with data and accompanying documentation to demonstrate any compliance or non-compliance with the Consent Judgment. Because it will require some amount of time to come into substantial compliance with this Consent Judgment, the initial round of data and accompanying documentation shall be due on or before January 1, 2020, which may be extended only upon mutual agreement of the parties, and a progress report shall be submitted to the Monitor on or before October 15, 2019.
- b. The Monitor may request and consider additional non-privileged information in order to assess MSPD's compliance with the terms of this Consent Judgment.

- c. On a bi-annual basis, beginning six months from the Effective Date, the Monitor shall produce and submit to the Parties a detailed report outlining the extent to which the MSPD is in compliance with the terms of this Consent Judgment.

XX. DISPUTE RESOLUTION

- a. The United States District Court for the Western District of Missouri shall retain jurisdiction to enforce the terms of this Consent Judgment and the Parties' obligations thereunder.
- b. If Plaintiffs' counsel reasonably believes that the MSPD is not in substantial compliance with the terms of this Consent Judgment, Plaintiffs' counsel shall bring the issue(s) to the attention of the Monitor in order to conduct further investigation into the issue(s) raised.
- c. In the event that the Monitor determines that the MSPD is not in compliance with the terms of this Consent Judgment, s/he shall notify the Court and counsel for the Plaintiffs in writing, and may request a hearing to seek further guidance from the Court or recommend appropriate modifications to the Consent Judgment in light of MSPD's non-compliance.

XXI. GENERAL PROVISIONS

- a. Modification
 - i. This Consent Judgment may not be modified without the written consent of the Parties and the approval of the Court. However, the Parties agree that nonmaterial modifications of this Consent Judgment can be made, with the written consent of the Parties, without approval of the Court.
- b. Termination

- i. Defendants may seek termination of the Consent Judgment pursuant to Federal Rule of Civil Procedure 60(b). For purposes of Rule 60(b)(6), six consecutive bi-annual reports from the Monitor concluding the MSPD is in substantial compliance with the Consent Judgment may constitute a reason that justifies relief from the provisions articulated herein.

c. Third-party Beneficiaries

- i. All indigent persons who are now, or who will be, under formal charge before a state court in Missouri for allegedly having committed any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention (regardless of whether actually imposed), and who are represented by MSPD, or should be represented by MSPD, pursuant to this Consent Judgment, but who have not received counsel at a critical stage or who have been placed on a waiting list for representation by MSPD, shall be hereby deemed third-party beneficiaries to this Consent Judgment.
- ii. This Consent Judgment may be enforced by any of the named Plaintiffs in the case, or by any third-party beneficiary.

d. Expiration of Consent Judgment.

- i. This Consent Judgment shall expire seven years after the Effective Date.

e. Entire Judgment

- i. This Consent Judgment contains all the terms and conditions agreed upon by the Parties with regard to the settlement contemplated herein, and

supersedes all prior agreements, representations, statements, negotiations, and undertakings (whether oral or written) with regard to settlement.

f. Interpretation

- i.** The Parties acknowledge that each Party has participated in the drafting and preparation of this Consent Judgment; consequently, any ambiguity shall not be construed for or against either Party.

g. Time Periods

- i.** If any of the dates or periods of time described in this Judgment fall or end on a public holiday or on a weekend, the date or period of time shall be extended to the next business day.

h. No Waiver for Failure to Enforce

- i.** Failure by any Party to enforce this entire Consent Judgment or any provision thereof with respect to any deadline or other provision herein shall not be construed as a waiver of its right to enforce deadlines or provisions of this Consent Judgment.

i. Unforeseen Delay

- i.** If an unforeseen circumstance occurs that causes the MSPD to fail to timely fulfill any of the reporting requirements articulated in Section XIX(a) of this Consent Judgment, the MSPD shall notify the Monitor and Plaintiffs' counsel in writing within 20 days after the MSPD becomes aware of the unforeseen circumstance and its impact on the MSPD's ability to perform and the measures taken to prevent or minimize the failure. The MSPD shall take all reasonable measures to avoid or minimize any such

failure. Nothing in this paragraph shall alter any of the MSPD's obligations under this Consent Judgment or Plaintiffs' remedies for a breach of this Consent Judgment.

j. Binding Effect on Successors

- i.** The terms and conditions of this Consent Judgment, and the commitments and obligations of the Parties, shall inure to the benefit of, and be binding upon, the successors and assigns of each party.

k. Governing Law

- i.** This Consent Judgment shall be governed by and construed in accordance with the laws of the State of Missouri, without regard to the conflicts of law provisions thereof.

l. Signatories

- i.** The undersigned representative of each party to this Consent Judgment certifies that each is authorized to enter into the terms and conditions of this Consent Judgment and to execute and bind legally such Party to this document.

XXII. ATTORNEYS' FEES AND COSTS

- a.** Any motion for attorneys' fees and costs or bill of costs shall be filed by no later than 35 days after entry of this Consent Judgment.

It is so agreed.

Counsel for Plaintiffs

/s/ Jason D. Williamson

Jason D. Williamson
ACLU Foundation
125 Broad Street, 17th Floor
New York, NY 10004
(212) 284-7340
jwilliamson@aclu.org

May 13, 2019

Date

/s/ Anthony E. Rothert

Anthony Rothert
ACLU of Missouri Foundation
906 Olive Street
Suite 1130
St. Louis, MO 63101
(314) 652-3114
arothert@aclu-mo.org

May 13, 2019

Date

Counsel for Defendants:

/s/ J. Gregory Mermelstein

J. Gregory Mermelstein
MISSOURI STATE PUBLIC DEFENDER
Deputy Director/General Counsel
1000 West Nifong, Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
greg.mermelstein@mspd.mo.gov

May 13, 2019

Date

Approved and ORDERED by the Court.

The Honorable Nanette K. Laughrey
United States District Judge

Date

The Missouri Project

A Study of the Missouri Public Defender System
and Attorney Workload Standards



Includes a National Blueprint for Future Workload Studies

The Missouri Project:
A Study of the Missouri Public Defender System
and
Attorney Workload Standards

With a National Blueprint

June 2014

Prepared by:



On Behalf of the American Bar Association's
Standing Committee on Legal Aid and Indigent Defendants



This publication has been prepared by RubinBrown on behalf of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. The views expressed herein, unless otherwise noted, have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.



RubinBrown LLP
*Certified Public Accountants
& Business Consultants*

One North Brentwood
Saint Louis, MO 63105

T 314.290.3300
F 314.290.3400

W rubinbrown.com
E info@rubinbrown.com

RubinBrown was engaged by the American Bar Association (“ABA”) on behalf of its Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”) to provide consulting services and assist in the development of a process to calculate workload standards for the Missouri State Public Defender System. This report presents the results of the engagement. Our services were performed in accordance with the Statements on Standards for Consulting Services as prescribed by the American Institute of Certified Public Accountants.

RubinBrown LLP

RubinBrown LLP

Preface

This report is the result of a collaborative effort between RubinBrown LLP (“RubinBrown”),¹ the American Bar Association (“ABA”),² and the Missouri State Public Defender System (“MSPD”). The ABA has denominated the effort “The Missouri Project.” The effort was led by Michael T. Lewis (Partner-In-Charge of the Business Advisory Services group at RubinBrown). The research team consisted of Jason Mannello (RubinBrown), Josh Leemann (RubinBrown), and Kent Bausman, Ph.D. (Maryville University).

We would like to thank Stephen F. Hanlon,³ Chair of the Indigent Defense Advisory Group of the ABA’s Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”)⁴ for his assistance in this effort. We would also like to thank Cathy Kelly and Peter Sterling (Director and General Counsel, respectively, Missouri State Public Defender System) for providing guidance and insight into the MSPD’s practices and technical systems. We also appreciate the input and editorial comments of Norman Lefstein.⁵ We would also like to thank Dean Hunter for his editorial review.⁶

We would like to thank each member of the MSPD for their cooperation and input throughout the project. We would also like to thank the group of private bar attorneys and public defender experts asked to participate in numerous surveys and meetings. The project would not be possible without their input and efforts.

¹ Founded in 1952, RubinBrown (www.RubinBrown.com) is one of the nation’s leading accounting and professional consulting firms. RubinBrown helps its clients build and protect value, while at all times honoring the responsibility to serve the public interest. RubinBrown’s vision statement is: One firm, highly respected and nationally prominent with a solid foundation of core values, inspired team members and totally satisfied clients.

² The ABA (www.AmericanBar.org) is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all 50 states and other jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.

Since its founding, the ABA has actively worked in the fields of legal ethics and indigent defense. In 1908, the ABA adopted its first Canons of Professional Ethics (now the Model Rules of Professional Conduct) (“ABA Model Rules”). In 1913, the ABA created the entity now known as the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”). The ABA Ethics Committee publishes formal ethics opinions on professional and judicial conduct, provides informal responses to ethics inquiries, and, upon request, assists courts in their development, modification, and interpretation of ethical standards such as the ABA Model Rules and the ABA Model Code of Judicial Conduct.

³ For the last 20 years, much of Mr. Hanlon’s work has involved systemic challenges to indigent defense systems. Mr. Hanlon currently limits his practice to advising and representing public defenders with excessive caseloads. He currently teaches indigent defense at St. Louis University School of Law.

⁴ The ABA created SCLAID in 1920 and charged the entity with examining the delivery of legal services to assist the poor.

⁵ Mr. Lefstein is Professor of Law and Dean Emeritus of the Indiana University Robert H. McKinney School of Law, former Chairman of the ABA Section of Criminal Justice, Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Prosecution Function* and *The Defense Function*, *Providing Defenses Services*, and *Pleas of Guilty*, and former Chairman of the ABA Committee on Criminal Justice Standards.

⁶ Mr. Hunter is the Spring managing editor of the St. Louis University Public Law Review.

Table of Contents

Executive Summary	5
Introduction.....	7
Literature Review	9
Methodology & Analysis.....	11
A. System Analysis	12
B. Case Type / Case Task Summary	13
C. Time Study.....	15
D. Time Sufficiency Survey.....	16
E. Delphi Process	17
Attorney Workload Standard Conclusion.....	21

Report Exhibits

Exhibit 1: Concluded Workload Standards by Case Type and Case Task Group	23
Exhibit 2: Current Average Reported Case-Related Hours by Case Type and Case Task Group	24
Exhibit 3: Case Task Descriptions	25
Exhibit 4: List of Tasks Identified as Often Having Sufficient Time to Perform	26

National Blueprint Appendix

Appendix 1: Example Sufficiency Survey Instructions	28
Appendix 2: Example Sufficiency Survey	30
Appendix 3: The Delphi Methodology Employed in The Missouri Project.....	31
Appendix 4: Example Delphi Panel Invitation	32
Appendix 5: Example Delphi Time Survey Instructions	33
Appendix 6: Example Time Survey Questions	35
Appendix 7: Example Delphi Time Survey Instructions for Successive Surveys	36
Appendix 8: Example Delphi Frequency Survey Instructions	38
Appendix 9: Example Frequency Survey Questions	40
Appendix 10: Example Structure and Layout of Response Summary	41
Appendix 11: Example Response Rates from the Time Survey	42
Appendix 12: Estimated Response Rates from the Time Sufficiency Survey	43
Appendix 13: A Note on Public Defender System Requirements.....	44
Appendix 14: Example Engagement Letter Language	45

Executive Summary

This report lays out the methodology, analysis, and results of the joint efforts of the MSPD, the ABA, and RubinBrown to develop data-supported workload standards. Although this effort is not the end of the process, it is a critical first step in establishing supportable, data-driven workload standards that can assist the MSPD in assessing staffing requirements and provide empirical support to determine maximum workloads.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended maximum case loads for public defender programs (the “NAC Standards”). However, the NAC Standards were not based upon empirical study⁷ and MSPD’s recent application of the NAC Standards has been criticized by the Missouri State Auditor and the National Center for State Courts (“NCSC”). Both the Missouri State Auditor and the NCSC concluded:

- MSPD’s protocol “suffers significantly from its failure to depart from NAC caseload standards,”
- The protocol suffers “from its apparent inability to make fuller use of a 2006 time study,”⁸ and
- “Our review of the calculations and available data supporting the caseload protocol noted the MSPD lacks sufficient support for the data and methodology used for protocol calculations.”⁹

These critiques were at the forefront of the analysis to establish new workload standards for the MSPD. This study does not rely upon the 1973 NAC Standards. It instead utilizes MSPD’s current time data, combined with a data-driven survey process, to calculate new workload standards.

Daily time entry became a mandatory function for all MSPD practitioners as of March 1, 2013.¹⁰ This study utilized MSPD time data for a 25-week period beginning in March of 2013 and ending August of 2013 as the foundation for workload standards.

Excessive workloads result in insufficient time available to provide reasonably effective assistance of counsel to all clients. As in prior studies of this type, this study required a means to identify areas where MSPD attorneys reported they often did not have sufficient time to complete certain tasks with reasonable effectiveness.

⁷ “From the NAC commentary, it is clear that no empirical study in support of its recommended caseload limits was ever undertaken.” NORMAN LEFSTEIN, AMERICAN BAR ASSOCIATION, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, 44-5 (2011).

⁸ NATIONAL CENTER FOR STATE COURTS, BRIEF COMMENT ON THE MISSOURI STATE PUBLIC DEFENDER COMMISSION’S CASELOAD STANDARD PROTOCOL: TECHNICAL ASSISTANCE PAPER 2, 11 (2010).

⁹ THOMAS. A. SCHWEICH, MO. STATE AUDITOR, REPORT NO. 2012-129, MISSOURI STATE PUBLIC DEFENDER 11 (2012).

¹⁰ At the time this report was issued, MSPD personnel did not record sick leave, vacation, or holidays in the time log system. However, this information was tracked in a separate form. Further, the Appellate division did not begin tracking time until April 1, 2013.

The study surveyed MSPD practitioners directly and was used to identify which case-related tasks they reported they often had either sufficient or insufficient time to perform based on current practices and staffing levels. The study then utilized a Delphi method to estimate the amount of time that should be allotted for those tasks that MSPD line defenders identified as often not having sufficient time to complete with reasonable effectiveness.¹¹ The Delphi method used in this study was an iterative process that included both experienced private practice criminal defense attorneys as well as MSPD line defenders.¹²

The resulting attorney workload standards, shown below, reflect estimates of the average amount of time¹³ an attorney can expect to spend on a category of Case Tasks for a particular type of case to provide reasonably effective assistance of counsel.¹⁴

Case Type	Controllable Case Task
	Hours per Case
Murder/Homicide	106.6
A/B Felony	47.6
C/D Felony	25.0
Sex Felony	63.8
Misdemeanor	11.7
Juvenile	19.5
Appellate/PCR	96.5
Probation Violation	9.8

The conclusion shown in the above chart reflects the consensus time expectations (under prevailing professional norms and standards) of a group of both private practice and public defender experts from across the state of Missouri. The above workload standards, however, are not the end of the process. Stakeholders throughout the criminal justice system recognize that the study and calculation of workload and related workload standards is a continuous process.

¹¹ MSPD line defenders were asked to identify tasks that they often did not have sufficient time to complete with reasonable effectiveness in the current environment (i.e., current practices and staffing levels).

¹² The study excluded MSPD personnel solely tasked with the administration and management of the system, focusing only on MSPD practitioners that carry a caseload.

¹³ Of course, some cases will take less time and some cases will take more time, but in each case, as the recent decision of the United States District Court for the Western District of Washington makes clear, reasonably effective representation “presumes a certain basic representational relationship” and the system of public defense must “[allow]...counsel to give each case the time and effort necessary” to ensure reasonably effective representation, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, 2013 WL 6275319, at *1, *3 (W.D. Wash. December 4, 2013), so that the prosecutor’s case can be subjected to “meaningful adversarial testing,” *United States v. Cronin*, 466 U.S. 648, 654, 659 (1984).

¹⁴ The workload standards include only case-related tasks over which an attorney has some control (i.e., exclude in court, travel, training, and administrative time). Further, the workload standards assume adequate support staff and attorney resources are available. Private practice defense counsel reported utilizing 2 support staff resources per attorney, on average. By contrast, the MSPD currently has approximately 2 attorneys for every 1 support staff resource (0.55 support staff per attorney, or approximately 1/4th of the support staff available to private practice defense counsel).

These standards should be revisited periodically to account for potential changes in technology and technology usage, indigent defendant demographics and crime patterns, the Missouri criminal code, and the staffing and organizational structure within the MSPD and the larger criminal justice system.

In addition, as the MSPD's time entry system matures and the amount of data contained within it increases, the ability to utilize that data to examine organization practices, study different types of complexity factors, and quantify time sufficiency will increase.

Introduction

The guarantee of assistance of counsel in one's defense against criminal prosecution is a right afforded under the Sixth Amendment to the U.S. Constitution and Article 1, Section 18(a) of the Missouri Constitution.

In 1963, the Supreme Court's decision in *Gideon v. Wainwright* extended the right to counsel to felony cases in state criminal courts;¹⁵ subsequently, the Supreme Court extended the right to counsel to misdemeanor cases ending with the defendant being imprisoned.¹⁶ A majority of states, however, recognize the right to a lawyer if the defendant is charged with a misdemeanor. In Missouri, the right to counsel is extended to defendants in misdemeanor cases if incarceration is probable.¹⁷

Despite the promise provided by the *Gideon* decision, many academics and legal scholars have concluded that much of that promise has remained unfulfilled.¹⁸ Simply assigning an attorney to a defendant does not ensure a fair outcome.¹⁹ Rather, pursuant to the Rules of Professional Conduct, proper defense representation requires that lawyers: 1) be competent to represent the client, 2) offer prompt and diligent representation of the client's interests, and 3) productively engage with the client while exercising independent judgment.²⁰

¹⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁶ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁷ See *State v. Watson*, 687 S.W.2d 667, 669 (Mo. Ct. App. 1985) (citing *Argersinger*, 407 U.S. at 37).

¹⁸ Bruce R. Jacob, *50 Years Later: Memories of Gideon V. Wainwright*, 87 FLA. B.J. 10 (2013); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309 (2013); Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316 (2013); NATIONAL RIGHT OF COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> and http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_justice_denied.authcheckdam.pdf; and ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

¹⁹ *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, 2013 WL 6275319, at *6 (W.D. Wash. December 4, 2013).

²⁰ Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715 (2010).

To guide policy makers and criminal defense practitioners in ensuring a fair and proper process, the American Bar Association has developed Criminal Justice Standards (“ABA Standards”)²¹ and the state of Missouri has developed the Missouri State Public Defender Guidelines for Representation (“Missouri Guidelines”).²²

The fulfillment of these obligations is dependent upon having sufficient resources available. In the years since *Gideon*, the consensus is that indigent defense in the United States has been inadequately supported, creating a crisis in the state of indigent defense.²³ According to Drinan, “[f]rom the start, states have failed to fund the indigent defense function adequately, and as the volume of criminal cases has grown over the years, too few lawyers have faced ever-increasing workloads. The result has been what many have called ‘assembly-line justice’ – in other words, egregious and persistent violations of the right to counsel.”²⁴

To address the potential violations of the right to counsel, several states and counties throughout the United States have begun to search for data-driven workload standards to assess and manage attorney resources in an attempt to provide adequate criminal defense for the poor. From our discussions with the MSPD, it was also clear that the system would benefit from a consistent methodology that would allow public defenders to quantify workload expectations necessary to provide reasonably effective assistance of counsel to indigent defendants.

²¹ The ABA Standards are the result of a lengthy process that has been in continual development since 1964. Specifically, the ABA Standards “are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the [ABA] Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years.” Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. (2009), available at http://www.americanbar.org/groups/criminal_justice/standards.html.

²² MISSOURI STATE PUBLIC DEFENDER SYSTEM, GUIDELINES FOR REPRESENTATION (1992).

²³ NATIONAL RIGHT OF COUNSEL COMMITTEE, *supra* note 18, at 4.

²⁴ Drinan, *supra* note 18, at 1311.

Literature Review

The Delphi method was introduced in 1962 by researchers at the Rand Corporation. The method was described as a “new” research technique utilized by the Air Force in the 1950s to gather expert opinion and generate a reliable consensus.²⁵ As a methodological strategy, the Delphi method proposed that a succession of surveys be given to a group of experts, with structured feedback presented to the experts at each interval stage.²⁶ The surveying practices applied by the Delphi method could be interviews or questionnaires that focus on some fundamental question of significance to the group of experts convened for feedback.

The features of this method include “anonymity, iteration, controlled feedback, and the statistical aggregation of group response.”²⁷ At the onset of the process, participants in a Delphi group are largely anonymous from one another. The purpose of anonymity is to ensure that solicited experts are not influenced by the responses of other participants and that the ideas presented are judged on their own merit. This technique is believed to be conducive to the exercise of independent thought on the part of participating experts and to aid experts in forming well-thought-out opinions.

The reliance on expert opinion as data is built on the premise that an expert is “able to select the needed items of background information, determine the character and extent of their relevance, and apply these insights to the formulation of the required personal probability judgments.”²⁸ Experts typically complete a questionnaire over multiple iterations with the goal of allowing participants to change their opinions and judgments when presented with controlled feedback regarding the opinions and judgments of their fellow participants. This controlled feedback is normally presented as a statistical summation of the group’s responses, e.g., a mean or median. The structured feedback at each successive iteration consists of “available data previously requested by...the experts..., or of factors and considerations suggested as potentially relevant by one or another respondent.”²⁹

²⁵ NORMAN DALKEY & OLAF HELMER, RM-727, AN EXPERIMENTAL APPLICATION OF THE DELPHI METHOD TO THE USE OF EXPERTS 1 (1962), available at http://www.rand.org/content/dam/rand/pubs/research_memoranda/2009/RM727.1.pdf.

²⁶ *Id.*

²⁷ Gene Rowe & George Wright, *The Delphi Technique as a Forecasting Tool: Issues and Analysis*, 15 INT’L J. OF FORECASTING 353, 354 (1999).

²⁸ OLAF HELMER & NICHOLAS RESCHER, P-1513, ON THE EPISTEMOLOGY OF THE INEXACT SCIENCES 42 (1958) available at <http://www.rand.org/content/dam/rand/pubs/papers/2005/P1513.pdf>.

²⁹ DALKEY & HELMER, *supra* note 25, at 2.

The goal of the feedback at each stage is to assist in limiting mistaken beliefs an expert may have on the question at hand or to increase their awareness of other information they may not have previously considered.³⁰

At the conclusion of the final iteration, the final iteration's mean or median response is used as the measure of the group's opinion.³¹ In theory, the number of iterations required of the Delphi method can be unlimited until consensus among participants is achieved, however it has been found that three to four iterations is usually all that is required to reach consensus.³² Rowe and Wright systematically reviewed studies that explored the effectiveness of the Delphi method. Their focus was on how well the Delphi method worked in producing a consensus of opinions and judgments and to assess how accurate those opinions and judgments were.

Overall, they found that the majority of these evaluative studies showed support for the Delphi method in reducing variances in opinion and judgment, thus indicating that greater consensus had been achieved. As for the concern over the accuracy of those opinions and judgments, Rowe and Wright again found that the majority of studies provide compelling evidence in support of the Delphi method. Compared to other methodological techniques utilized for similar purposes, the Delphi method was found to "lead to improved judgments over staticized groups and unstructured interacting groups."³³

Since its introduction, the Delphi method has been employed across a diverse array of industries, such as health care, education, information systems, transportation, and engineering.³⁴ The purpose of its use beyond forecasting has ranged from "program planning, needs assessment, policy determination, and resource utilization."³⁵ Within the legal system, early examples of use of the Delphi method can be traced back a couple of decades.

Examples of these attempts were sponsored by both the National Association of Court Management ("NACM") and the National Center for State Courts ("NCSC"). These efforts were principally charged with assessing judicial and court support staff needs.³⁶

³⁰ *Id.* at 2–3.

³¹ Rowe & Wright, *supra* note 27, at 354.

³² Chia-Chien Hsu & Brian A. Sandford, *The Delphi Technique: Making Sense of Consensus*, 12 PRAC. ASSESSMENT, RES. & EVALUATION 1 (2007), available at <http://pareonline.net/pdf/v12n10.pdf>.

³³ Rowe & Wright, *supra* note 27, at 366.

³⁴ HAROLD A. LINSTONE & MURRAY TUROFF, *THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS* 10–11 (2002); Rowe & Wright, *supra* note 27, at 355.

³⁵ Hsu & Sandford, *supra* note 32, at 1. For detailed examples of the application of the Delphi method, see LINSTONE & TUROFF, *supra* note 34.

³⁶ See, e.g., VICTOR E. FLANGO & BRIAN J. OSTROM, NAT'L CENTER FOR STATE COURTS, *ASSESSING THE NEED FOR JUDGES AND COURT SUPPORT STAFF* (1996).

In the 2000's, the NCSC started using Delphi techniques in addressing the caseload and workload crisis of indigent defense in the United States. In a recent book, Lefstein comments on the use of the Delphi method, noting:

“The technique is recommended when a problem does not lend itself to precise measurement and can benefit from collective judgments. This would seem to be precisely the situation when a defense program seeks to determine how much additional time, on average, its lawyers need to spend on a whole range of activities involving different kinds of cases.”³⁷

The Delphi method has been recommended as a necessary complement to time-based studies that seek to determine appropriate caseloads for defense lawyers.³⁸ What the Delphi method is believed to offer is a method to adjust preliminary case weights based on time studies while avoiding the institutionalization of potentially sub-standard current practices.

Methodology & Analysis

Past workload studies³⁹ were reviewed and assessed in developing the methodology advanced in this study, which sought to quantify the amount of time a public defender should expect to spend on a particular task in a particular case type through an application of the Delphi method. As in prior studies, the Delphi methodology was used to provide an estimate of what workload standards *should be* in order for a public defender to provide reasonably effective assistance of counsel. However, among other things, this study expands upon prior work in this field in that it focuses on both the amount of time that should be spent on a task, as well as how often a task should be completed. Further, this study expands on prior work in that it utilizes the input of private practice defense counsel.

To determine workload standards, a multi-step process was used that first analyzed the current, “actual” state of affairs as a starting point. After an introduction of the definitions and key terms utilized throughout this study, the methodology can best be explained as the performance of the following steps:

³⁷ NORMAN LEFSTEIN, AMERICAN BAR ASSOCIATION, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, *supra* note 1, at 146.

³⁸ *Id.* at 149.

³⁹ See National Center for State Courts’ (“NCSC”) reports: MATTHEW KLEIMAN & CYNTHIA G. LEE, VIRGINIA INDIGENT DEFENSE COMMISSION ATTORNEY AND SUPPORT STAFF WORKLOAD ASSESSMENT – FINAL REPORT (2010); NATIONAL CENTER FOR STATE COURTS, A WORKLOAD ASSESSMENT STUDY FOR THE NEW MEXICO TRIAL COURT JUDICIARY, NEW MEXICO DISTRICT ATTORNEYS’ OFFICES, AND THE NEW MEXICO PUBLIC DEFENDER DEPARTMENT – FINAL REPORT (2007); NATIONAL CENTER FOR STATE COURTS, MARYLAND ATTORNEY AND STAFF WORKLOAD ASSESSMENT (2005). See also ELIZABETH NEELEY, UNIV. NEB. PUB. POLICY CENTER, LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT (2008).

- A. System Analysis
- B. Case Type / Case Task Summary
- C. Time Study
- D. Time Sufficiency Survey
- E. Delphi Process

Standards, Definitions, and Key Information

Sufficient time to complete the specific task: the amount of time, on average, reasonably required to complete the task with reasonable effectiveness.

Reasonable effectiveness: effective representation under prevailing professional norms.

Typical case: average, or typical, case considering that each case may have significant variability in the level of complexity (i.e., language, mental health, and other issues).

ABA Criminal Justice Section Standard 4-6.1(b): "Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."

Missouri v. Frye (132 S.Ct. 1399, 2012): "...ninety-four percent of state convictions are the result of guilty pleas."

A. System Analysis

The MSPD provides "direct representation to over 98% of the indigent defendants accused of state crimes."⁴⁰ The system is comprised of approximately 585 employees, of which 376 (64%) are attorneys and 209 (36%) are support staff. In other words, there is approximately one support staff resource for every two attorneys. The line defender attorney group consists of 312 public defenders in the trial division, 36.5 public defenders in the Appellate/PCR division, and 17 public defenders in the capital division. The trial and appellate/PCR division support staff group consists of 43 legal assistants, 56.5 investigators, 6.5 paralegals, 3 mitigation specialists, and 67.5 secretaries.

The MSPD maintains a case management system that tracks basic case information such as open date, close date, charge type, disposition type, jurisdiction, and assigned attorney. This study utilized the current 2-year extract of the case management database consisting of over 120,000 cases and over 300 different charge types.

⁴⁰ STATE OF MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2012 ANNUAL REPORT 7 (2012).

Since March of 2013, the MSPD has required that all of its public defenders enter their time in a time log system. This system captures the amount of time across over 50 types of tasks for all MSPD practitioners on each case.

This study linked the case management system with the time log system as a basis for the workload analysis. Based upon MSPD's current systems, cases were grouped by type and attorney time spent on each case was grouped by task.

B. Case Type / Case Task Summary

Working with the MSPD, 11 different Case Types were initially identified to use in the development of new workload standards. The 11 Case Types are:

- | | |
|----------------------|-------------------------------|
| 1. Murder / Homicide | 7. Probation Violation |
| 2. Sex Felony | 8. Sexual Predator Proceeding |
| 3. AB Felony | 9. Appeals/PCR |
| 4. CD Felony | 10. Release Petitions |
| 5. Misdemeanor | 11. Special Writs |
| 6. Juvenile | |

From an assessment of current cases, it was determined that Special Writs, Release Petitions, and Sexual Predator Proceedings were highly specialized and infrequent. As a result, these Case Types were excluded from the study. The remaining 8 Case Types⁴¹ are as follows:

1. Murder / Homicide
2. Sex Felony
3. AB Felony
4. CD Felony
5. Misdemeanor
6. Juvenile
7. Probation Violation
8. Appeals/PCR

Case Type is currently the primary way complexity is addressed in this workload study, though it is recognized that case complexity can be impacted by a variety of factors. Language barriers, mental health history, and family issues are just a few examples of factors that can impact case complexity.

⁴¹ The remaining Case Types capture the vast majority of case specific time in the MSPD time log system. For this study, the "Murder / Homicide" Case Type did not include capital murder cases. Juvenile cases primarily encompass juvenile delinquency cases; however, there are a small percentage of juvenile status offenses. The MSPD does not handle abuse or neglect cases involving juveniles.

All else equal, however, different Case Types generally have different degrees of average complexity. For example, without any prior case specific knowledge, it is reasonable to assume that a Class A felony will be more complex than a misdemeanor. Since both the case management database and the time log system consistently report Case Type, this data was utilized to assess current actual time and resource utilization, which provides the foundation to draw conclusions about time and resource allocation by Case Type. The 8 Case Types form the foundation for the workload standards and are used to identify how MSPD practitioners are actually spending their time under current conditions and practice.

This study was particularly interested in the tasks that are best performed by attorneys (versus support staff), and in those attorney tasks that may be affected by excessive workloads. In other words, this study sought to identify which attorney Case Tasks are impacted by excessive caseloads and time constraints. An attorney typically has more control over the time spent on certain Case Tasks, such as trial preparation, research, interviews, etc. ("Controllable Tasks") than the time spent on other Case Tasks, such as travel, court, etc. ("Non-Controllable Case Tasks"). Therefore, Case Tasks were segregated into two different categories for purposes of this study:

Controllable Case Tasks

- **Client Communication:**
 1. In Person
 2. Over the Phone
 3. Written
 4. Family/Other Communications
- **Discovery/Investigation:**
 5. State's Discovery Disclosure
 6. Records and Transcripts
 7. Depositions and Witness Interviews
 8. Experts and Technical Research
- **Case Preparation:**
 9. Legal Research
 10. Drafting and Writing
 11. Plea Negotiation
 12. Court Preparation
 13. Case Management
 14. Alternative Sentencing Research

Non-Controllable Case Tasks

15. In Court - Pretrial
16. In Court – Trial
17. In Court – Appellate Argument
18. Travel
19. Miscellaneous Case Administration

Once identified, the Case Type and Case Task classifications were utilized to measure how MSPD attorneys are currently spending their time on case-related work.

C. Time Study

The Time Study combines MSPD's time entry database with its case management database to present a picture of how much time MSPD practitioners are spending on case-related work. Time data was extracted from the time entry database for a 25-week period beginning March 2013 and ending August 2013. This data showed how much time, in total, MSPD practitioners spent on case-related tasks.

This data was combined with case count information from the MSPD case management database to calculate average time spent per Case Type, shown below.⁴²

Case Type	Average Reported Controllable Case Task Hours per Case
Murder/Homicide	84.5
A/B Felony	8.7
C/D Felony	4.4
Sex Felony	25.6
Misdemeanor	2.3
Juvenile	4.6
Appellate/PCR	30.3
Probation Violation	1.4

The calculation first annualized the total case-related time incurred over the 25-week period (by dividing the total time by 25 weeks, and then multiplying the result by the 52 weeks in a year). We then estimated the average time per Case Type by using MSPD's case management database to estimate the average number of cases for which that time is incurred.

Specifically, we determined the average number of open cases between March 31, 2013 and August 31, 2013 (to reflect a workload that is concurrent with the time data), and then annualized that figure by dividing the open workload by the average length of case (based on fiscal year 2012 and fiscal year 2013 case management database). The resulting figure is an estimate of the number of cases per year. The annualized total time incurred divided by the estimated number of cases per year provides the average reported time per case, as shown below.

⁴² The chart summarizes current average reported time on case-related tasks by Case Type. Further, the reported average excludes travel, in court, and administrative time. This Delphi study has focused on the Controllable Case Tasks for each of the 8 referenced case types, excluding all Non-Controllable Case Tasks (which account for a significant portion of an attorney's time), because the time required for the Non-Controllable Case Tasks is predominantly dictated by the court's schedule and the geography of the district.

Case Type	Annual Hours		Annual Case Count		Average Reported Controllable Case Task Hours per Case
Murder/Homicide	22,677	÷	269	=	84.5
A/B Felony	53,855	÷	6,196	=	8.7
C/D Felony	113,002	÷	25,910	=	4.4
Sex Felony	26,916	÷	1,051	=	25.6
Misdemeanor	30,127	÷	13,322	=	2.3
Juvenile	7,085	÷	1,554	=	4.6
Appellate/PCR	44,719	÷	1,477	=	30.3
Probation Violation	24,405	÷	16,977	=	1.4

The Time Study quantified how MSPD attorneys are actually spending their time. However, it does not indicate if this actual time is sufficient to provide reasonably effective assistance of counsel.

D. Time Sufficiency Survey

A “Time Sufficiency Survey” was conducted on MSPD line defenders.⁴³ MSPD practitioners were asked what percentage of the time for specific Case Type / Case Task combinations they had sufficient time to complete the task with reasonable effectiveness.

The Time Sufficiency Survey results were utilized to exclude certain Case Type and Case Task combinations from the Delphi process.⁴⁴ That is to say, if MSPD practitioners indicated that they often had sufficient time to adequately perform the specified Case Task for the Case Type based on current practices and staffing levels, the particular task was excluded from the Delphi process.

The Time Sufficiency Survey was performed by creating a questionnaire that was distributed via email to all MSPD line defenders by a third-party, professional survey provider. The survey asked respondents in what percentage of cases do they have sufficient time to complete the Case Task with reasonable effectiveness.

⁴³ The survey excluded operations personnel and senior management, focusing on public defenders currently carrying a case load.

⁴⁴ See the attached Exhibit 4 for the list of excluded Case Type and Case Task combinations.

The questions were asked for each Controllable Case Task within each Case Type, and the respondents were able to indicate their response by choosing either 0-20%; 21-40%; 41-60%; 61-80%; or 81-100% of the time. An example of the survey instrument is shown in the illustration below.

Case Type: Felony CD

For Felony CD cases, please select the percentage of cases for which you have sufficient time to complete the respective case-related task with reasonable effectiveness.

Please also indicate the amount of time (in minutes) that you feel is typically sufficient to complete the respective task with reasonable effectiveness.

***Do you typically work on the referenced type of case (prior to appeal)? Your answer will determine whether you should proceed with this section of the survey.**

☐ Yes, I work on the referenced type of case and will proceed with this section of the survey (please complete each of the below questions; select not applicable if you do not typically perform the respective task.)

☐ No, I do not work on the referenced type of case and will move on to the next section.

	0-20%	21-40%	41-60%	61-80%	81-100%	Not applicable
CL-PHONE - Attorney / client phone conference.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please enter the amount of time (in minutes) needed to complete the above task with reasonable effectiveness for the specific case type.

The Time Study, combined with the Time Sufficiency Survey, described the “current state of affairs.” In other words, these two components of the analysis allowed for 1) the quantification of how MSPD practitioners currently spend their time on cases, broken down by Case Type / Case Task combinations and, 2) the identification of those Case Type / Case Task combinations where MSPD practitioners report that there is not enough time to perform those functions with reasonable effectiveness.

To move from the “current state of affairs” to a “sufficient state” required a methodology to gauge how much time should be allowed for performance of certain Case Type / Case Task combinations. The “Delphi Process” was utilized to obtain this data.

E. Delphi Process

The Time Sufficiency Survey, in combination with the Time Study, provides critical information about current practice. However, the Time Sufficiency Survey results indicated that the MSPD defenders may be operating under excessive workloads. Thus, current practice may provide very little useable information about how much time attorneys *should be* spending and how often attorneys *should be* performing particular tasks in order to provide reasonably effective assistance of counsel.

The Delphi process used in this study leverages the expertise of both private practice and public defenders to provide a consensus estimate of the amount of time defense counsel *should* expect to spend on a particular case in order to provide reasonably effective assistance of counsel. Further, in providing estimates of the amount of time an attorney should expect to spend on a particular case, the Delphi panel was asked to consider prevailing professional norms and standards of practice. That is to say, the standards resulting from this process should reflect the prevailing professional norms and standards, such as the Missouri Guidelines and the ABA Standards.

As a first step in this process, the time an attorney spends on a particular case can be broken out into two components, time and frequency, as follows:

1. time incurred on the performance of specific Case Tasks (“Task Time”); and
2. the actual performance (or non-performance) of certain Case Tasks (“Task Frequency”).⁴⁵

Then, criminal defense experts (private, as well as public defense practitioners) from across the state of Missouri were identified and asked to participate in an iterative study of the time associated with the Case Tasks and Case Types. The expert panel was asked to provide an estimate of the amount of time that *should be* spent on each Case Task for each Case Type, assuming that the task must be performed. An example of the survey instrument for this step is shown in the illustration below.

Felony CD Cases

Below, you will be asked to provide your estimate of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness.

Please enter your response in minutes.

CLIENT COMMUNICATION - IN PERSON - Time for privileged client interviews and consultations conducted face-to-face.

How much time, on average, is reasonably required to perform this task with reasonable effectiveness?

Minutes:

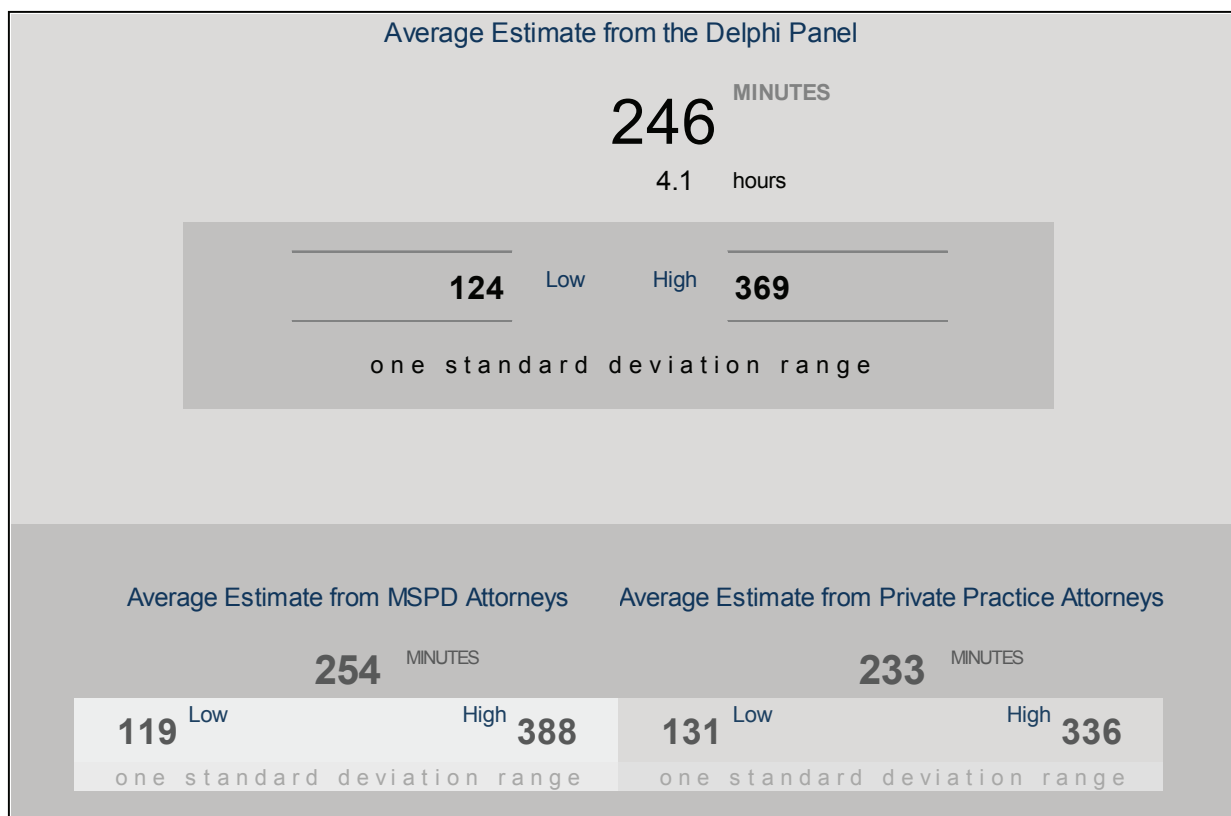
(Optional) Please provide an explanation of your time estimate.

⁴⁵ For example, Task Frequency component seeks to answer: “In how many cases does an attorney speak to a client over the phone?” This is contrasted with the number of phone calls an attorney may make within a particular case, which was not in the scope of this study.

The response estimates of Task Time were then summarized across the entire group of experts. The group was then provided summary statistics on the point estimate and range of time from this first survey. An example of the summary information from the first survey round is shown in the table below.

CD Felony (Estimated Minutes)	Lower	Average	Upper
Client Communication - In person	30	309	606

Using the same survey instrument as the first round, the expert panel was then asked to again provide an estimate of the Task Time, this time taking into account the summary of responses from the first round of the process. Similar to the first iteration, the responses were summarized across all participants for this round as well. This round also presented the summarized responses of the private practice and MSPD attorney groups. An example of the summary from this second round is shown below for the same **CD felony** Case Type and **in person client communication** Case Task.



As a third and final iteration, the expert panel was invited to participate in a live meeting to discuss a summary of the second round of the survey process and to reach a group consensus for each Task Time estimate. The information in the above illustration was presented to the group during the in person discussion. The group was reminded to keep in mind that the time estimate should:

1. assume adequate support staff (and that attorneys would only perform tasks not appropriate for support staff),
2. assume that the task must be performed,
3. apply prevailing professional norms, and
4. provide an estimate of the amount of time defenders should expect to perform the Case Task.

Given the above information, the group was asked to either confirm the time estimate from the second survey round, or provide a new estimate to replace the second round average.

Although this initial survey process provided an estimate of the typical amount of time required for a particular task, it did not provide insight into the frequency with which these tasks should be performed. To collect this data, the Delphi panel was asked to repeat the same process (making the same assumptions as above and applying professional norms) as with the Task Time estimates, only now providing an estimate of the frequency that defenders *should* expect to perform the Case Tasks. Again, the three stage process resulted in a group consensus of the Task Frequency for each Case Type.

As a final step in the Delphi process, the Task Time was combined with the Task Frequency to arrive at an expected time for each Case Task. That is to say, the Task Time was multiplied by the Task Frequency as follows:

$$\text{Expected Time per Task} = \text{Task Time} \times \text{Task Frequency}$$

The expected time per task is interpreted as the amount of time that a public defender *should* expect to spend on any one Case Task and Case Type combination for the typical case. The Delphi panel was then convened for a final meeting for a presentation of the results of the Delphi process to confirm the time expectation resulting from the study. The expected time was then summarized for each Case Type in arriving at the final workload standards.

The Delphi panel's frequency weight was applied to the time estimate to arrive at the estimated amount of time that an attorney can reasonably expect to spend on a particular task for a given Case Type. The resulting workload standards for each Case Type are shown below.⁴⁶

⁴⁶ The reported workload standards include only time for Controllable Case Tasks (i.e. exclude in court, travel, and administrative time). The workload standard total shown in the table is rounded to the nearest 10th of an hour.

Case Type	Average Reported Hours		Delphi Panel Adjustment		Workload Standard for Controllable Case Tasks
Murder/Homicide	84.5	+	22.2	=	106.6
A/B Felony	8.7	+	38.9	=	47.6
C/D Felony	4.4	+	20.7	=	25.0
Sex Felony	25.6	+	38.2	=	63.8
Misdemeanor	2.3	+	9.5	=	11.7
Juvenile	4.6	+	15.0	=	19.5
Appellate/PCR	30.3	+	66.2	=	96.5
Probation Violation	1.4	+	8.3	=	9.8

Attorney Workload Standard Conclusion

The following table shows the Delphi-estimated time required for controllable Case Tasks for an attorney to provide reasonably effective defense by Case Type.⁴⁷

Case Type	Controllable Case Task Hours per Case
Murder/Homicide	106.6
A/B Felony	47.6
C/D Felony	25.0
Sex Felony	63.8
Misdemeanor	11.7
Juvenile	19.5
Appellate/PCR	96.5
Probation Violation	9.8

This study sought to quantify the amount of time a public defender *should* expect to spend on a particular type of case through an application of the Delphi method. In other words, this study sought to quantify what workload standards *should be* in order for a defender to provide reasonably effective assistance of counsel.

⁴⁷ The workload standards include only case-related tasks over which an attorney has some control (i.e., exclude in court, travel, training, and administrative time). Further, the workload standards assume adequate support staff and attorney resources are available. Private practice defense counsel reported utilizing 2 support staff resources per attorney, on average. By contrast, the MSPD system currently has approximately 2 attorneys for every 1 support staff resource (0.55 support staff per attorney, or approximately 1/4th of the support staff available to private practice defense counsel).

Exhibit 1 (attached to this report) shows the estimated time by both Case Type and Case Task group. The conclusion shown in the above chart reflects the consensus time expectations (under prevailing professional norms and standards) of a group of both private practice and public defender experts from across the state of Missouri.

Exhibit 1: Concluded Workload Standards by Case Type and Case Task Group

	Client Communication ¹	Discovery/Investigation ²	Case Preparation ³	Total
Murder/Homicide	34.6	33.5	38.5	106.6
AB Felony	13.1	18.3	16.2	47.6
CD Felony	6.3	8.4	10.3	25.0
Sex Felony	22.5	17.8	23.6	63.8
Misdemeanor	3.5	4.1	4.1	11.7
Juvenile	5.4	6.8	7.3	19.5
Appellate/PCR	20.3	31.5	44.7	96.5
Probation Violation	2.9	2.6	4.2	9.8

^{1.} The client communication Case Task group includes: in person conversations, phone calls, written communication, and communication with family.

^{2.} The discovery/investigation Case Task group includes: State's discovery disclosures, records and transcripts, depositions and witness interviews, and expert and technical research.

^{3.} The case preparation Case Task group includes: legal research, drafting and writing, plea negotiations, alternative sentencing research, court preparation, and case management.

Exhibit 2: Current Average Reported Case-Related Hours by Case Type and Case Task Group

	Client Communication ¹	Discovery/Investigation ²	Case Preparation ³	Total
Murder/Homicide	14.8	33.5	36.2	84.5
AB Felony	3.0	2.1	3.6	8.7
CD Felony	1.8	0.8	1.7	4.4
Sex Felony	6.0	7.3	12.4	25.6
Misdemeanor	0.9	0.4	0.9	2.3
Juvenile	1.4	1.0	2.1	4.6
Appellate/PCR	3.1	7.5	19.6	30.3
Probation Violation	0.7	0.2	0.5	1.4

^{1.} The client communication Case Task group includes: in person conversations, phone calls, written communication, and communication with family.

^{2.} The discovery/investigation Case Task group includes: State's discovery disclosures, records and transcripts, depositions and witness interviews, and expert and technical research.

^{3.} The case preparation Case Task group includes: legal research, drafting and writing, plea negotiations, alternative sentencing research, court preparation, and case management.

Exhibit 3: Case Task Descriptions

Case Task	Task Description
<i>Client Communication - In person</i>	Attorney's time for privileged client interviews and consultations conducted face-to-face.
<i>Client Communication - Phone</i>	Attorney's time for privileged client interviews and consultations conducted via phone.
<i>Client Communication - Written</i>	Attorney's time for privileged client interviews and consultations conducted by written correspondence. Includes drafting and reviewing correspondence prepared by others.
<i>Client Communication - Family/other communications</i>	Non-privileged communications with client's family and friends, not including potential witnesses.
<i>Discovery/Investigation - State's discovery disclosure</i>	Attorney's time receiving, organizing and reviewing the state's disclosure to all discovery requests including special discovery by motion.
<i>Discovery/Investigation - Records and transcripts not included in state's discovery</i>	Attorney's time in requesting, acquiring and reviewing records which were not part of the state's disclosure, e.g., client's medical records.
<i>Discovery/Investigation - Depositions and witness interviews</i>	Attorney's time preparing for and conducting depositions or witness interviews where the attorney is investigating the case.
<i>Discovery/Investigation - Experts and technical research</i>	Identifying, contracting, and consulting experts including testimony prep and also attorney's time doing self research on a technical (not legal) subject.
<i>Case Preparation - Legal research</i>	Case related legal research for arguments, motions or briefs.
<i>Case Preparation - Drafting and writing</i>	Attorney's time actually drafting, typing or reviewing legal documents including motions and briefs.
<i>Case Preparation - Plea negotiation</i>	Plea negotiation with the state's attorney or representative whether verbal or written.
<i>Case Preparation - Court preparation</i>	Attorney's time reflecting, analyzing, brainstorming and outlining court case presentation. Also includes subpoenas, writs ad testificandum, and pre-charge representation.
<i>Case Preparation - Case management</i>	Attorney's time for case related office administrative tasks, e.g., time keeping, billing, and docket management tasks.
<i>Case Preparation - Alternative sentencing research</i>	Attorney's time identifying, locating, and engaging alternative sentencing resources, e.g., treatment programs.

Exhibit 4: List of Tasks Identified as Often Having Sufficient Time to Perform

	Murder/ Homicide	AB Felony	CD Felony	Sex Felony	Misdemeanor	Juvenile	Appellate/ PCR	Probation Violation
Client Communication								
In person								
Phone	X		X	X		X		
Written								
Family/other communications								
Discovery/Investigation								
State's discovery disclosure	X			X			X	
Records and transcripts	X							
Depositions & interviews	X			X				
Experts and technical research	X							
Case Preparation								
Legal research	X			X		X		
Drafting and writing	X							
Plea Negotiation								
Court Preparation	X	X	X	X	X	X		
Case management	X							
Alternative sentencing research								

The table shows the 22 Case Type and Case Task combinations that MSPD practitioners identified as often having sufficient time to adequately perform based on current practices and staffing levels. If the Case Type and Case Task combination was identified by MSPD practitioners and the practitioner estimated sufficient time was consistent with actual time spent on the particular task (from the time log system), the combination was excluded from the Delphi process. Specifically, if the average survey results were higher than 3.3 (on a scale of 1 to 5, 5 being most often having sufficient time) and the average estimated time needed was at least 75% of the actual time observed the Case Type and Case Task combination was excluded from the Delphi process.

It is important to note that it is anticipated that this study will be the first of many performed by the MSPD. An evaluation should be performed in each subsequent study to determine which Case Type and Case Task combinations should be included, or excluded, based upon the results of the Sufficiency Survey.

A National Blueprint

In the following appendices, we set forth additional detail and documents for use by other state and local public defender programs attempting to replicate the work and methodology set forth in The Missouri Project. With appropriate modifications, the additional detail and documents can be used by other public defender programs wishing to replicate The Missouri Project methodology in their respective jurisdictions.

Appendix 1: Example Sufficiency Survey Instructions

RE: Public Defender System Workload Study

As you may be aware, the Public Defender System is currently undertaking a study to develop new workload standards to assist in evaluating the Public Defender System resource requirements.

A key step in this process is the completion of a time sufficiency survey by public defenders and the supporting staff. A time sufficiency survey assists researchers in identifying specific areas where, on average, public defenders feel that they either do or do not have sufficient time to complete the specific task (and thus may be impacting their ability to provide effective assistance to clients). This survey will also provide valuable insight from public defenders on how long various tasks should take.

Your participation in this survey is critical to the process of developing new workload standards specific to the public defender system. You are being asked to complete the electronic time sufficiency survey that will be sent as an email link from a survey provider.

The survey asks a series of questions by type of case ("Case Type") and the specific case-related tasks ("Case Task"). You will be asked in what percentage of those specific cases do you feel that you have sufficient time to complete the Case Task with reasonable effectiveness. Each question has a related question which asks how much time, on average, you feel is necessary to perform the specific Case Task with reasonable effectiveness.

In completing the survey please consider the following:

- Your responses will be kept confidential and any reporting of the results of the sufficiency survey will be done anonymously.
- While each case has significant variability in the level of complexity (i.e., language, mental health, and other issues), the survey is meant to capture responses for the "typical" case. In other words, please consider the average case.
- "Sufficient time" to complete the specific task means the amount of time, on average, reasonably required to complete the task with reasonable effectiveness. "Reasonable effectiveness" means effective representation under prevailing professional norms.
- The questions are segregated along "n" Case Types:
 - Case Type 1
 - Case Type 2
 - Case Type n

If you do not work on the respective type of case, please select “No” for that section of the survey and proceed to the next page. If you do work on the respective type of case, please select “Yes” and answer each Case Task question, selecting or entering “Not applicable” if you do not perform the specified task for that Case Type.

- The Case Tasks are the same tasks that you utilize for time entry in your Time Log system.
- The time sufficiency survey will ask you to indicate in what percentage of cases DO YOU HAVE sufficient time to complete the indicated case-related task (we are not asking in what percentage of cases you don’t have sufficient time to complete the indicated task).

We know you face many demands of your time. It is estimated that this survey will take approximately 1 – 3 hours to complete, and your progress will be saved for each section as you click “Next” so the survey can be completed over multiple sessions. You can access your saved survey via the original survey link in the email. Your participation in this process is a critical part of the process in developing accurate and defensible workload standards.

Thank you for your time and attention to this very important matter.

Appendix 2: Example Sufficiency Survey**Case Type: Felony CD**

For Felony CD cases, please select the percentage of cases for which you have sufficient time to complete the respective case-related task with reasonable effectiveness.

Please also indicate the amount of time (in minutes) that you feel is typically sufficient to complete the respective task with reasonable effectiveness.

***Do you typically work on the referenced type of case (prior to appeal)? Your answer will determine whether you should proceed with this section of the survey.**

- ☐ Yes, I work on the referenced type of case and will proceed with this section of the survey (please complete each of the below questions; select not applicable if you do not typically perform the respective task.)
- ☐ No, I do not work on the referenced type of case and will move on to the next section.

	0-20%	21-40%	41-60%	61-80%	81-100%	Not applicable
CL-PHONE - Attorney / client phone conference.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Please enter the amount of time (in minutes) needed to complete the above task with reasonable effectiveness for the specific case type.						
<input type="text"/>						

Appendix 3: The Delphi Methodology Employed in The Missouri Project

Assembling the Delphi Panel

During the initial phases of the Delphi process, a list of over 50 private practice attorneys and 50 public defenders was compiled by a steering committee of experts led by MSPD management. Experience, reputation, and location were all considered when compiling this list of over 100 attorneys. Each attorney on the list was extended an invitation to participate in a study to develop workload standards for state of Missouri (see Appendix 4 for example invitation language). Of the over 100 invitations, 32 private practice attorneys and 35 public defenders expressed interest and availability to participate in the study.

Designing the Survey

The general survey content was heavily influenced by MSPD's time entry system and the Case Types and Case Tasks included in the survey were modeled after the MSPD system. An initial survey instrument was built and sent to 5 randomly selected Delphi panel members to elicit comments and feedback that would then be used to develop the final survey structure prior to surveying the entire Delphi group. In order to facilitate a more effective survey, the time component (i.e., how long a task would take, assuming that the task is performed) was broken out from the frequency component (i.e., how often the task is performed). Specifically, isolating the research variables (i.e., time and frequency) facilitates a more robust structured feedback process by providing clarity and allowing the survey participants to avoid having to weight responses.

The Survey Process

Using the Time Survey process as an example, the initial survey round was anonymously administered to all 67 Delphi attorneys (see Appendix 5 for example instructions). It should also be noted that throughout the process, attention was paid to maintaining a balance of public defenders and private practice attorneys (see Appendix 11 for example response rates for the groups). The survey responses were compiled anonymously and summarized into an average response with an upper and lower bound (based on 1 standard deviation from the mean). The summarized responses were provided back to the Delphi panel and they were asked to complete the same anonymous survey again, after reviewing the summary statistics from round 1. The survey responses from round 2 were again summarized into an average response with an upper and lower bound (based on 1 standard deviation from the mean).

Survey Conclusions

Again using the Time Survey process as an example, those completing the second round of the survey were asked to participate in a live meeting to discuss survey results and develop final workload standard recommendations. 24 Delphi panel attorneys participated in the final live round, representing over 495 years of criminal defense and over 55 years of prosecution experience. The results from round 2 of the anonymous survey were presented during the in person meeting (as shown on page 19 of the Missouri Report). Each survey question was addressed individually and the participants were asked to comment, confirm, or recommend a final workload standard for the particular Case Type and Case Task combination before moving onto the next question. By the end of the approximately 8 hour meeting, all Time Survey questions were confirmed or updated by the Delphi panel.

Appendix 4: Example Delphi Panel Invitation

The Public Defender System ("PD") is currently undertaking a study to develop new workload standards to assist in evaluating PD resource requirements. You have been identified as a luminary within the field of criminal defense and have graciously agreed to participate in this Delphi study. We understand that there are many demands of your time and we greatly appreciate your agreement to participate. Although it is difficult to estimate the exact timing of the 'iterations' of this process at this point, we anticipate completing the first two (online) surveys over the next two to three weeks. Further, we anticipate following the survey portion of the process with a meeting (dependent upon coordinating the schedules of the various panel participants).

As a first step in this process, you will be receiving a (separate) follow-up email with a link to the first survey. (If you have not received the link to this survey by Monday (July 15), we ask that you please check your email spam folder to ensure that the message was not blocked by the email system.) We ask that you please carefully review the instructions and, if possible, complete the survey by July 19, 2013. If you have a conflict with this timing, please let us know and we will work hard to try to accommodate alternative timing.

We recognize that this is likely going to be a challenging endeavor and we are glad to be of assistance to you in any way that we can as you work through this process.

Appendix 5: Example Delphi Time Survey Instructions

RE: Public Defender System Workload Study

Thank you for your participation in this process. As you are aware, the Public Defender System is currently undertaking a study to develop new workload standards to assist in evaluating Public Defender System resource requirements.

A key step in this process is the completion of a Delphi study of criminal defense experts in the state of Missouri. The Delphi study will assist the public defender system in creating recommendations for workload standards. This process will provide valuable insight from criminal defense attorneys on the time reasonably required to perform various tasks.

The Delphi study will be structured into iterative phases. It is anticipated that the first 2-3 phases will consist of time sufficiency surveys that will ask participants how much time, on average, is reasonably required to perform a specific task for a specific case type. After compiling the results of the first survey, we anticipate reporting back to you summary statistics from the first round of the survey and submitting to you the second round survey, similar in format to the first round, asking you to update (or leave unchanged) your estimate based upon your review of the results of the first survey. In order to facilitate a consensus of the necessary time for the specific tasks, it is anticipated that there will be an in person (or conference call) panel discussion which will include the expert panel and representatives from the Public Defender System.

Your participation in this survey is critical to the process of developing new workload standards specific to the public defender system. You are being asked to complete the electronic time sufficiency survey that will be sent as an email link.

To start, you will be asked two questions regarding the support staff utilized for case work. Then, the survey asks a series of questions by the specific case-related tasks ("Case Task"). You will be asked how much time, on average, you believe is reasonably required to perform the Case Task for a typical case with reasonable effectiveness (for both attorneys and support staff).

In completing the survey please consider the following:

1. Your responses will be kept confidential and any reporting of the results of the sufficiency survey will be done anonymously.
2. While each case has significant variability in the level of complexity (i.e., language, mental health, and other issues), the survey is meant to capture responses for the "typical" case. In other words, please consider the average case.

3. "Sufficient time" to complete the specific task means the amount of time, on average, reasonably required to perform the task with reasonable effectiveness. "Reasonable effectiveness" means effective representation under prevailing professional norms.
4. The Case Tasks are similar to the tasks utilized by the Public Defender system for time entry in its Time Log system.
5. The questions are segregated along "n" Case Types:
 - a. Case Type 1
 - b. Case Type 2
 - ...
 - c. Case Type n
6. Your time estimate should reflect the cumulative time reasonably required to perform the task for the entire case. That is to say, if the task takes 10 minutes per instance and a typical case requires 5 instances, the appropriate response would be 50 minutes.
7. We will be available to assist with any questions you have regarding the survey or the Delphi study as you participate in the process.

We know you face many demands of your time. It is estimated that each survey will take approximately 1 – 3 hours to complete, and your progress will be saved as you click "Next" so the survey can be completed over multiple sessions. You can access your saved survey via the original survey link in the email. Your participation in this process is a critical part of the process in developing accurate and defensible workload standards.

Thank you for your time and attention to this very important matter.

Appendix 6: Example Time Survey Questions**Felony CD Cases**

Below, you will be asked to provide your estimate of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness.

Please enter your response in minutes.

CLIENT COMMUNICATION - IN PERSON: Time for privileged client interviews and consultations conducted face-to-face.

How much time, on average, is reasonably required to perform this task with reasonable effectiveness?

Minutes:

(Optional) Please provide an explanation of your time estimate.

CLIENT COMMUNICATION - PHONE: Same as above only by phone.

How much time, on average, is reasonably required to perform this task with reasonable effectiveness?

Minutes:

(Optional) Please provide an explanation of your time estimate.

Appendix 7: Example Delphi Time Survey Instructions for Successive Surveys

RE: Public Defender System Workload Study

Thank you again for your participation in this process and the completion of the phase 1 survey. We are now ready to begin phase 2 of the iterative Delphi process and appreciate your continuing participation.

In phase 1, we asked participants how much time, on average, is reasonably required to perform a specific task for a specific case type. We have compiled the results of the first survey, and will be reporting back to you summary statistics from that survey. In addition, we will be submitting to you the second round survey, similar in format to the first round, asking you to reenter your estimate based upon your review of the results of the first survey. The results of this second round survey will be used to facilitate the in person panel discussion which will include the expert panel and representatives from the Public Defender System.

Your continued participation in this survey is critical to the process of developing new workload standards specific to the public defender system. As in the first round, you are being asked to complete the electronic time sufficiency survey that will be sent as an email link.

To start, we would like to highlight the primary change from the first round:

1. You will be presented with summary statistics (explained in more detail below) from the first survey. These are intended to assist in informing your responses to the second round.

Other than this change, the second round survey will be very similar in format to the first round survey. The Case Types are the same, and the Case Tasks are the same as well. The survey itself will provide two response areas per question: one for your time estimate in minutes (which will be restricted to numeric responses only) and an additional *optional* comment box which will provide an opportunity to comment on your estimate if you feel it is necessary.

We will be providing you with two data points for each Case Type / Case Task combination – the average time estimate for each combination, and a range of time estimates for each combination. Please review this data prior to and during your completion of the phase 2 survey. In reviewing this data, please keep in mind that:

1. The average time estimate is a single point estimate showing the average response of all phase 1 participants.
2. The range that we present contains approximately $2/3^{\text{rds}}$ of all phase 1 participant estimates. In other words, the range we present is not the entire range of estimates received, but is approximately limited to the central $2/3^{\text{rds}}$ of responses.

In completing the survey please consider the following:

- Your responses will be kept confidential and any reporting of the results of the sufficiency survey will be done anonymously.
- While each case has significant variability in the level of complexity (i.e., language, mental health, and other issues), the survey is meant to capture responses for the “typical” case. In other words, please consider the average case.
- "Sufficient time" to complete the specific task means the amount of time, on average, reasonably required to perform the task with reasonable effectiveness. "Reasonable effectiveness" means effective representation under prevailing professional norms.
- Your time estimate should reflect the cumulative time reasonably required to perform the task for the entire case. That is to say, if the task takes 10 minutes per instance and a typical case requires 5 instances, the appropriate response would be 50 minutes.
- We will be available to assist with any questions you have regarding the survey or the Delphi study as you participate in the process.

We know you face many demands of your time. It is estimated that this survey will take approximately 1 – 3 hours to complete, and your progress will be saved as you click “Next” so the survey can be completed over multiple sessions. You can access your saved survey via the original survey link in the email. Your participation in this process is a critical part of the process in developing accurate and defensible workload standards.

Thank you for your time and attention to this very important matter.

Appendix 8: Example Delphi Frequency Survey Instructions

RE: Public Defender System Workload Study

Thank you again for your participation in this process. In the initial phases of the Delphi process, you were asked to provide an estimate of reasonable time required to perform a specific task for a specific case type. We are now seeking information regarding the frequency of performance of specific tasks for specific case types and appreciate your continuing participation.

We will be sending you a survey, similar in format to the last survey, asking you to enter your estimate of the percentage of cases that defenders should perform the specific task. Specifically, you will be asked to “Provide your estimate of the percentage of cases that attorneys *should* perform the specific task to provide reasonably effective representation.” Also similar to the last survey, we anticipate completing two iterations of this frequency survey:

Iteration 1: You will be asked to provide an estimate of the percentage of cases that attorneys should perform the specific task.

Iteration 2: You will be asked to provide an estimate of the percentage of cases that attorneys should perform the specific task, *after you review a summary of Iteration 1 responses*.

Your continued participation in this survey is critical to developing new workload standards specific to the public defender system. Similar to prior surveys, you are being asked to complete the electronic survey that will be sent to you as an email link.

The survey itself will provide two response areas per question: one for your frequency estimate—in percentage form— (which will be restricted to numeric responses only); and an *optional* comment box which will provide you an opportunity to comment on your estimate, as necessary.

In completing the survey please consider the following:

1. Your responses will be kept confidential and any reporting of the results of the sufficiency survey will be done anonymously.
2. While each case has significant variability in the level of complexity (i.e., language, mental health, and other issues), the survey is meant to capture responses for the “typical” case. In other words, please consider the average case.
3. Your frequency estimate should be in percentage form (i.e. enter “25” for 25% of cases).
4. Your response should reflect the frequency that attorneys (not support staff) *should* perform the specific task to provide reasonably effective representation.

5. Your frequency estimate should reflect the typical case (or average case), assuming adequate support staff.
6. For example, if you enter “25” for the task question, your response will be interpreted as: On average, 25% of cases require performance of that particular task in order to provide reasonably effective representation.
7. "Reasonably effective" means effective representation under prevailing professional norms.
8. In responding, please consider the ABA Criminal Justice Standards (found here: [ABA Standards](#)) and the State guidelines for representation (found here: [PD Guidelines](#)).
9. We will be available to assist you with any questions you may have regarding the survey or the Delphi study as you participate in the process.

We know you face many demands of your time. It is estimated that this survey will take approximately 1 to 3 hours to complete, and your progress will be saved as you click “Next” so the survey can be completed over multiple sessions. You can access your saved survey via the original survey link in the email. Your participation in this process is critical to developing accurate and defensible workload standards.

Thank you for your time and attention to this very important matter.

Appendix 9: Example Frequency Survey Questions**Felony CD Cases**

Below, you will be asked to provide your estimate of the percentage of cases, on average, that attorneys should perform the specific task to provide reasonably effective representation.

Please enter your response as a percentage (for example, please enter 25 for 25%)

CLIENT COMMUNICATION - IN PERSON: Time for privileged client interviews and consultations conducted face-to-face.

Please enter an estimate of the percentage of cases, on average, that attorneys should perform the above task to provide reasonably effective representation.

Percent of cases:

(Optional) Please provide an explanation of your percentage estimate.

CLIENT COMMUNICATION - PHONE: Same as above only by phone.

Please enter an estimate of the percentage of cases, on average, that attorneys should perform the above task to provide reasonably effective representation.

Percent of cases:

(Optional) Please provide an explanation of your percentage estimate.

Appendix 10: Example Structure and Layout of Response Summary**CD Felony****(Lower Limit, Average, and Upper Limit of Survey Responses)**

	Lower	Average	Upper
Client Communication - In person			
Client Communication - Phone			
Client Communication - Written			
Client Communication - Family/other communications			
Discovery/Investigation - State's discovery disclosure			
Discovery/Investigation - Records and transcripts not included in state's discovery			
Discovery/Investigation - Depositions and witness interviews			
Discovery/Investigation - Experts and technical research			
Case Preparation - Legal research			
Case Preparation - Drafting and writing			
Case Preparation - Plea Negotiation			
Case Preparation - Court Preparation			
Case Preparation - Case management			
Case Preparation - Alternative sentencing research			

Appendix 11: Example Response Rates from the Time Survey

Delphi Time Survey Stats	Private	Public ¹	Total
Total Number of Surveys Sent	32	35	67
Round 1 Response Rate	94%	91%	92%
Round 2 Response Rate	41%	74%	58%
Round 3 Response Rate	31%	40%	36%

¹. The "Round 1 Response Rate" for public defenders represents 226 responses from the 247 surveys sent out to MSPD line defenders. The subsequent survey rounds represent the 35 Delphi panel participants chosen from all MSPD line defenders.

Appendix 12: Estimated Response Rates from the Time Sufficiency Survey

	Murder/ Homicide	AB Felony	CD Felony	Sex Felony	Misdemeanor	Juvenile	Appellate/ PCR	Probation Violation	Average
Response Count ¹	103	163	175	132	129	42	25	134	113
Attorneys ²	123	266	298	181	187	46	40	213	169
Response Rate	84%	61%	59%	73%	69%	91%	63%	63%	70%

^{1.} The average response count for all survey questions by Case Type.

^{2.} The number of attorneys consistently recording time (averaging at least 1.0 hour per week) to the particular Case Type in the MSPD time log system.

Appendix 13: A Note on Public Defender System Requirements

Time Entry System

The public defender system should have a time entry (or time log) system meeting the following minimum requirements:

- Ability to track:
 - Attorneys' case related time by Case Type and Case Task
 - Attorneys' non-case related time
 - Time in increments no greater than a quarter of an hour
- Case Type and Case Task classification consisting of:
 - 15 – 25 case-related (attorney controllable) tasks
 - Case-related (uncontrollable) tasks
 - Non-case related tasks
 - At least 10 unique Case Types
- Time entry system should be:
 - Mandatory system-wide
 - Consistent across public defender system's offices
 - Able to track all attorney time
 - Fully deployed for at least six-months prior to commencement of study
 - Consistent with the Case Management System

Case Management System

The public defender system's case management system should meet the following minimum requirements:

- Case Management System Case Types are identical to Time Log System Case Types
- Consist of at least twelve-months of system-wide case information
- Have a case identifier also used in Time Log System
- Consistent across public defender system's offices

In addition, it would be beneficial (but not part of the minimum requirements) if other factors such as language barriers, mental health issues, and other complexity factors can be captured in the case management system.

Commitment to Permanent Time Keeping

Permanent time keeping is a critical component to the implementation, ongoing study, and refinement of attorney workload standards. In addition, it can be an invaluable management and analysis tool for a public defender system independent of the need for workload standards. Therefore, we believe it is critical that the public defender system commits to continuous time keeping.

Appendix 14: Example Engagement Letter Language

This letter of engagement ("Letter") sets forth the services that RubinBrown LLP ("RubinBrown") will provide for _____ ("Client"). In order to better understand each party's obligations, the terms "we", "us" and "our" refer to RubinBrown and the terms "you", "your" and "management" refer to the Client. Your engagement of RubinBrown shall be governed by the terms of this Letter and the attached RubinBrown Engagement Terms.

Scope of Services

RubinBrown will provide you with consulting services designed to assess and calculate caseload standards for the _____ Public Defender system ("PD"). We will coordinate our efforts with _____, who is engaged on behalf of the PD, to perform our services and provide our deliverable. Based upon our understanding of the proposed project, we anticipate performing the work in the following phases:

1. **Overview of the PD system:** In Phase 1 of the project, we anticipate receiving (from PD) the following data for analysis:
 - a. Annual case load (measured by new cases by year, type, and location) over an agreed upon number of years; and
 - b. Personnel overview of PD (measured by number, type, location, part time / full time status, and years of experience of PD staff) over an agreed upon number of years.

We will utilize this data to gain an understanding of the current state of the PD and to create and present to the PD summary data tables that provide a basic overview of the current caseload and structure of PD.

2. **PD Time Study:** Phase 2 of the project will involve commenting on, and ultimately the receipt of data from, the in-process time study (the "Time Study"). It is our understanding the PD has begun tracking personnel time on a system wide basis. We anticipate communicating and collaborating with the PD to obtain a clear understanding of how time is being tracked and categorized. It is our understanding that time is being captured along two (2) dimensions: Case Type (a broad designation of the type of case, such as Class B Felony or traffic related, for example) and Case Task (a field to capture the specific tasks and functions that are performed by PD personnel for each Case Type, such as meetings with client or preliminary motions, for example).

We will utilize this data to measure and present the current case load mix and initial case weights (i.e., how are PD personnel currently spending their time). Based upon similar studies performed in other states, we anticipate that the **minimum** time required for the Time Study is six (6) weeks.

3. **PD Time Sufficiency Survey:** Phase 3 of the project will utilize an already completed survey of PD personnel (the “Time Sufficiency Survey”) to obtain their perspective on whether the current time spent (by Case Task) is sufficient to fulfill their obligations.

We anticipate that specific objectives of Phase 3 will involve:

- a. Receiving the raw, underlying data from the Time Sufficiency Survey;
- b. Analyzing the data from the Time Sufficiency Survey;
- c. Creating summary data tables to provide a basic overview of the Time Sufficiency Survey;
- d. Presenting preliminary summary tables to PD for review; and
- e. Comparing preliminary conclusions from the Time Sufficiency Survey to the preliminary conclusions from the Time Study.

We will utilize this data to identify the Case Tasks that PD personnel have indicated they currently do not have sufficient time to complete.

4. **PD Interviews:** In Phase 4, we anticipate interviewing three to five experienced PD personnel in order to discuss the results of, and our takeaways from, the Time Study and Time Sufficiency Survey. These interviews will help provide assurance that we are interpreting the data correctly as well as provide PD an opportunity to provide additional insight into the data and the overall process.
5. **Delphi Method:** Phase 5 will involve coordinating with an expert panel assembled by _____ to obtain estimates of time allocations for those Case Type / Case Task categories that were deemed to have deficiencies in current practice. This panel will be comprised of both experienced PD public defenders and experienced criminal defense practitioners who have experience with the kinds of cases typically handled by the PD.

We expect that this phase will include two distinct survey processes consisting of a time survey and a frequency survey. By the end of Phase 5, we will have the set of final recommended case weights based upon the results of the Time Study, Time Sufficiency Survey, and panel input from applying the Delphi Method. These final case weights will form the basis for the recommended caseload standards.

6. **Final Report:** Our final deliverable will consist of a written report that will:
 - a. Present the final results of our analysis;
 - b. Document and describe all the steps taken and work performed in Phases 1 through 5; and
 - c. Present the caseload standards and the underlying data and results in summary form through the use of tables, figures, and graphs.

We anticipate that writing the Final Report will not actually be a final, distinct phase, but will actually be drafted throughout the process and performance of Phases 1 through 5. We will present _____ with an initial draft report for comments and feedback. The Final Report will be issued once that feedback has been received and considered.

